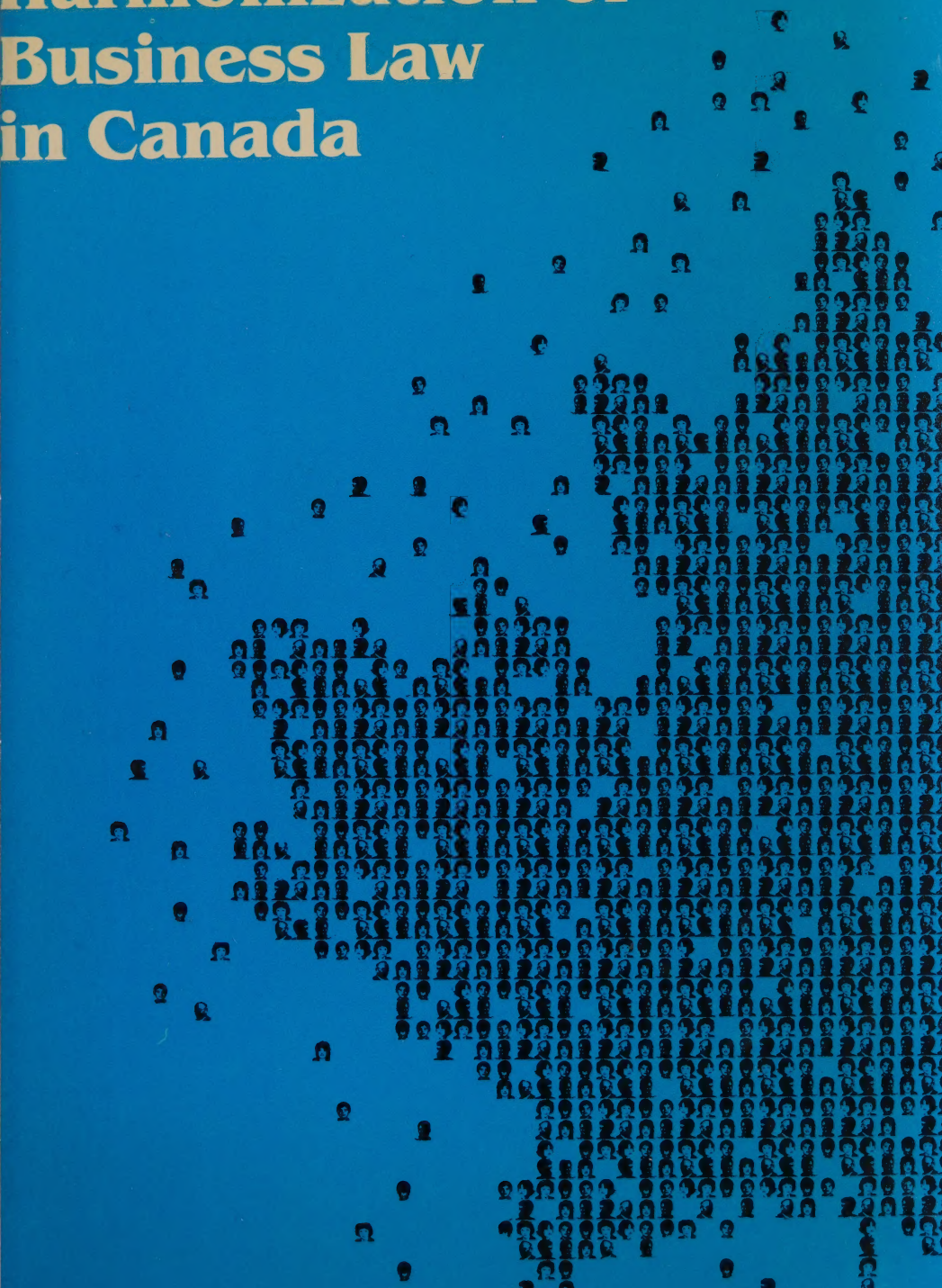
RONALD C. C. CUMING, Research Coordinator

Harmonization of Business Law in Canada



Harmonization of Business Law in Canada

This is Volume 56 in the series of studies commissioned as part of the research program of the Royal Commission on the Economic Union and Development Prospects for Canada.

The studies contained in this volume reflect the views of their authors and do not imply endorsement by the Chairman or Commissioners.

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RONALD C.C. CUMING
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Published by the University of Toronto Press in cooperation with the Royal Commission on the Economic Union and Development Prospects for Canada and the Canadian Government Publishing Centre, Supply and Services Canada

University of Toronto Press
Toronto Buffalo London

Grateful acknowledgment is made to the following for permission to reprint previously published and unpublished material: Australian Law Journal; Clerk of the Ontario Legislative Assembly, Province of Ontario.

Printed in Canada
ISBN 0-8020-7303-4
ISSN 0829-2396
Cat. No. Z1-1983/1-41-56E

CANADIAN CATALOGUING IN PUBLICATION DATA

Main entry under title:
Harmonization of business law in Canada

(*The Collected research studies / Royal Commission on the Economic Union and Development Prospects for Canada,*
ISSN 0829-2396 ; 56)
Includes bibliographical references.
ISBN 0-8020-7303-4

1. Conflict of laws — Corporations — Canada — Addresses, essays, lectures. 2. Conflict of laws — Commercial law — Canada — Addresses, essays, lectures. 3. Corporation law — Canada — Provinces — Addresses, essays, lectures. I. Cuming, Ronald C.C. II. Royal Commission on the Economic Union and Development Prospects for Canada. III. Series: The Collected research studies (Royal Commission on the Economic Union and Development Prospects for Canada) ; 56.

KE432.Z85837 1985 342.71'042 C85-099119-6

PUBLISHING COORDINATION: Ampersand Communications Services Inc.
COVER DESIGN: Will Rueter
INTERIOR DESIGN: Brant Cowie/Artplus Limited

CONTENTS

FOREWORD

When the members of the Rowell-Sirois Commission began their collective task in 1937, very little was known about the evolution of the Canadian economy. What was known, moreover, had not been extensively analyzed by the slender cadre of social scientists of the day.

When we set out upon our task nearly 50 years later, we enjoyed a substantial advantage over our predecessors; we had a wealth of information. We inherited the work of scholars at universities across Canada and we had the benefit of the work of experts from private research institutes and publicly sponsored organizations such as the Ontario Economic Council and the Economic Council of Canada. Although there were still important gaps, our problem was not a shortage of information; it was to interrelate and integrate — to synthesize — the results of much of the information we already had.

The mandate of this Commission is unusually broad. It encompasses many of the fundamental policy issues expected to confront the people of Canada and their governments for the next several decades. The nature of the mandate also identified, in advance, the subject matter for much of the research and suggested the scope of enquiry and the need for vigorous efforts to interrelate and integrate the research disciplines. The resulting research program, therefore, is particularly noteworthy in three respects: along with original research studies, it includes survey papers which synthesize work already done in specialized fields; it avoids duplication of work which, in the judgment of the Canadian research community, has already been well done; and, considered as a whole, it is the most thorough examination of the Canadian economic, political and legal systems ever undertaken by an independent agency.

The Commission's research program was carried out under the joint

direction of three prominent and highly respected Canadian scholars: Dr. Ivan Bernier (*Law and Constitutional Issues*), Dr. Alan Cairns (*Politics and Institutions of Government*) and Dr. David C. Smith (*Economics*).

Dr. Ivan Bernier is Dean of the Faculty of Law at Laval University. Dr. Alan Cairns is former Head of the Department of Political Science at the University of British Columbia and, prior to joining the Commission, was William Lyon Mackenzie King Visiting Professor of Canadian Studies at Harvard University. Dr. David C. Smith, former Head of the Department of Economics at Queen's University in Kingston, is now Principal of that University. When Dr. Smith assumed his new responsibilities at Queen's in September 1984, he was succeeded by Dr. Kenneth Norrie of the University of Alberta and John Sargent of the federal Department of Finance, who together acted as Co-directors of Research for the concluding phase of the Economics research program.

I am confident that the efforts of the Research Directors, research coordinators and authors whose work appears in this and other volumes, have provided the community of Canadian scholars and policy makers with a series of publications that will continue to be of value for many years to come. And I hope that the value of the research program to Canadian scholarship will be enhanced by the fact that Commission research is being made available to interested readers in both English and French.

I extend my personal thanks, and that of my fellow Commissioners, to the Research Directors and those immediately associated with them in the Commission's research program. I also want to thank the members of the many research advisory groups whose counsel contributed so substantially to this undertaking.

DONALD S. MACDONALD

At its most general level, the Royal Commission's research program has examined how the Canadian political economy can better adapt to change. As a basis of enquiry, this question reflects our belief that the future will always take us partly by surprise. Our political, legal and economic institutions should therefore be flexible enough to accommodate surprises and yet solid enough to ensure that they help us meet our future goals. This theme of an adaptive political economy led us to explore the interdependencies between political, legal and economic systems and drew our research efforts in an interdisciplinary direction.

The sheer magnitude of the research output (more than 280 separate studies in 70+ volumes) as well as its disciplinary and ideological diversity have, however, made complete integration impossible and, we have concluded, undesirable. The research output as a whole brings varying perspectives and methodologies to the study of common problems and we therefore urge readers to look beyond their particular field of interest and to explore topics across disciplines.

The three research areas, — *Law and Constitutional Issues*, under Ivan Bernier; *Politics and Institutions of Government*, under Alan Cairns; and *Economics*, under David C. Smith (co-directed with Kenneth Norrie and John Sargent for the concluding phase of the research program) — were further divided into 19 sections headed by research coordinators.

The area *Law and Constitutional Issues* has been organized into five major sections headed by the research coordinators identified below.

- Law, Society and the Economy — *Ivan Bernier and Andrée Lajoie*
- The International Legal Environment — *John J. Quinn*
- The Canadian Economic Union — *Mark Krasnick*

- Harmonization of Laws in Canada — *Ronald C.C. Cuming*
- Institutional and Constitutional Arrangements — *Clare F. Beckton and A. Wayne MacKay*

Since law in its numerous manifestations is the most fundamental means of implementing state policy, it was necessary to investigate how and when law could be mobilized most effectively to address the problems raised by the Commission's mandate. Adopting a broad perspective, researchers examined Canada's legal system from the standpoint of how law evolves as a result of social, economic and political changes and how, in turn, law brings about changes in our social, economic and political conduct.

Within *Politics and Institutions of Government*, research has been organized into seven major sections.

- Canada and the International Political Economy — *Denis Stairs and Gilbert Winham*
- State and Society in the Modern Era — *Keith Banting*
- Constitutionalism, Citizenship and Society — *Alan Cairns and Cynthia Williams*
- The Politics of Canadian Federalism — *Richard Simeon*
- Representative Institutions — *Peter Aucoin*
- The Politics of Economic Policy — *G. Bruce Doern*
- Industrial Policy — *André Blais*

This area examines a number of developments which have led Canadians to question their ability to govern themselves wisely and effectively. Many of these developments are not unique to Canada and a number of comparative studies canvass and assess how others have coped with similar problems. Within the context of the Canadian heritage of parliamentary government, federalism, a mixed economy, and a bilingual and multicultural society, the research also explores ways of rearranging the relationships of power and influence among institutions to restore and enhance the fundamental democratic principles of representativeness, responsiveness and accountability.

Economics research was organized into seven major sections.

- Macroeconomics — *John Sargent*
- Federalism and the Economic Union — *Kenneth Norrie*
- Industrial Structure — *Donald G. McFetridge*
- International Trade — *John Whalley*
- Income Distribution and Economic Security — *François Vaillancourt*
- Labour Markets and Labour Relations — *Craig Riddell*
- Economic Ideas and Social Issues — *David Laidler*

Economics research examines the allocation of Canada's human and other resources, the ways in which institutions and policies affect this

allocation, and the distribution of the gains from their use. It also considers the nature of economic development, the forces that shape our regional and industrial structure, and our economic interdependence with other countries. The thrust of the research in economics is to increase our comprehension of what determines our economic potential and how instruments of economic policy may move us closer to our future goals.

One section from each of the three research areas — The Canadian Economic Union, The Politics of Canadian Federalism, and Federalism and the Economic Union — have been blended into one unified research effort. Consequently, the volumes on Federalism and the Economic Union as well as the volume on The North are the results of an interdisciplinary research effort.

We owe a special debt to the research coordinators. Not only did they organize, assemble and analyze the many research studies and combine their major findings in overviews, but they also made substantial contributions to the Final Report. We wish to thank them for their performance, often under heavy pressure.

Unfortunately, space does not permit us to thank all members of the Commission staff individually. However, we are particularly grateful to the Chairman, The Hon. Donald S. Macdonald; the Commission's Executive Director, J. Gerald Godsoe; and the Director of Policy, Alan Nymark, all of whom were closely involved with the Research Program and played key roles in the contribution of Research to the Final Report. We wish to express our appreciation to the Commission's Administrative Advisor, Harry Stewart, for his guidance and advice, and to the Director of Publishing, Ed Matheson, who managed the research publication process. A special thanks to Jamie Benidickson, Policy Coordinator and Special Assistant to the Chairman, who played a valuable liaison role between Research and the Chairman and Commissioners. We are also grateful to our office administrator, Donna Stebbing, and to our secretarial staff, Monique Carpentier, Barbara Cowtan, Tina DeLuca, Françoise Guilbault and Marilyn Sheldon.

Finally, a well deserved thank you to our closest assistants: Jacques J.M. Shore, *Law and Constitutional Issues*; Cynthia Williams and her successor Karen Jackson, *Politics and Institutions of Government*; and I. Lilla Connidis, *Economics*. We appreciate not only their individual contribution to each research area, but also their cooperative contribution to the research program and the Commission.

IVAN BERNIER
ALAN CAIRNS
DAVID C. SMITH

The studies contained in this and a companion volume are part of the work of the Law and Constitutional Issues Research Program of the Royal Commission and were prepared by the participants in the section of the program on the harmonization of law in Canada. The studies explore many of the fundamental questions associated with efforts to bring the disparate laws of Canada's thirteen jurisdictions into harmony.

The available evidence indicates that at least some of the Fathers of Confederation accepted with considerable reluctance a federal form of constitutional structure for Canada. Their mistrust no doubt was induced, in part at least, by the war and chaos then occurring in the United States. Fortunately our federal system has, for the most part, worked reasonably well. What is surprising is that it has functioned without effective mechanisms to facilitate harmonization of laws that deal with matters of national importance. While a significant degree of harmonization has developed in certain areas of Canadian law, it is not the product of a conscious choice by legislators to deal with matters of national concern in a coordinated manner.

Two basic questions underlie the studies in the two volumes of this research section: (1) Has the time come when Canadians can no longer afford to permit legislators and government administrators their former freedom to pursue narrow, parochial interests with little regard to national interests? (2) If a greater measure of coordinated policy development and implementation is required, what institutional restructuring will be necessary?

The importance of having mechanisms to facilitate harmonization of law in Canada was recognized early in Canadian history. Measures were included in the British North America Act to achieve uniformity of the

law of the provinces. In 1918, the Uniform Law Conference of Canada was created with the objective of securing uniformity of provincial legislation throughout the country where necessary and practical. However, the constitutional measures were ineffective, and the Uniform Law Conference has been much less successful than its creators and supporters had hoped. Is the lack of success a product of institutional failure or the lack of political will on the part of Canadians and their governments? These studies do not provide a definitive answer to this question. What they do provide is background information in a general context and in the context of five specific areas of the law, which will help readers reach their own conclusions.

Each volume begins with a general discussion of harmonization of law in Canada. In the Overview contained in the first volume, I explore some of the fundamental issues that are associated with efforts to harmonize the laws of the various jurisdictions of a confederation. In particular, I examine the inherent contradiction between the concepts of federalism and interjurisdictional harmonization of law. In addition, I describe and assess the various mechanisms that have been employed throughout Canadian history to secure harmonization of law.

Professor Ziegel's study, which begins the second volume, looks at harmonization of law in Canada from a slightly different perspective. The author proceeds from the assumption that harmonization is a positive and necessary feature of Canadian development. He explains why harmonization measures have been so ineffective in the past and offers proposals for institutional reorganization and reorientation designed to facilitate harmonization of law in the future.

The five other studies examine harmonization of specific areas of the law, chosen because they best illuminate the problems associated with harmonization efforts in many other areas. Professor Neilson's study of harmonization of consumer protection law focusses on the difficulties associated with harmonization of law in an area where both the federal parliament and the provincial legislatures have jurisdiction. Professor Wuester's study of education law demonstrates that few areas of law can be viewed as having only local significance. The study of harmonization of securities law by Professor Anisman and the study of harmonization of insurance law by Professor Baer display the important role that bureaucracy plays in harmonization of certain areas of the law. Professor Anisman's study points to the limitations of harmonization by the bureaucracy, and Professor Baer's points to some of the dangers to democratic lawmaking that are associated with it.

From the early days of Confederation it has been argued that, if nothing else, basic commercial law should be harmonized throughout Canada. My study in the second volume focusses on the successes and failures of the various attempts to secure harmonization of Canadian personal property security law, and compares the Canadian record to

that of the United States. It points out that Canadians have failed to accomplish in the context of twelve jurisdictions what the Americans have accomplished in the context of fifty, and he offers an explanation for this disparity in accomplishment between the two countries.

There is persuasive evidence that interjurisdictional cooperation and coordination will be a sine qua non if Canada is to maintain or improve its current position in an increasingly competitive international economic environment. It is argued that fragmented policy making weakens the Canadian economy and prevents the realization of its potential. However, effective harmonization measures entail costs: they are inimical to the processes of democratic lawmaking, they lead to loss of local control, and they enhance the powers of bureaucracies. Canadians must therefore identify the mix of effective local control and interjurisdictional cooperation that will be most appropriate for the future. The studies contained in these two volumes highlight the factors involved in this important decision.

RONALD C.C. CUMING

The procedure that was generally followed by the participants in the section titled Harmonization of Law in Canada was to invite outside experts to attend research group meetings in order to provide reaction to early drafts of research papers as well as guidance in preparation of later drafts. Those who accepted the invitation and who attended the meetings made important contributions to the studies published in this and the companion volume.

Mr. William Hurlburt Q.C., Chairman of the Institute of Law Research and Reform of Alberta, made available to the participants counsel based on his extensive experience as a leading law reformer in Canada. The searching questions and insightful suggestions contained in his written observations were of particular value in the preparation of the Coordinator's overview. The extensive experience of Mr. H. Allan Leal Q.C., Vice Chairman of the Ontario Law Reform Commission, as a leading member of the Uniform Law Conference of Canada for many years was of obvious value to a study of harmonization of law in Canada. Three other contributors provided much appreciated guidance in specific areas: Dr. Hugh Stevenson, in the area of education law; Professor William Tetley Q.C., in the area of insurance law, and Professor Ed Belobaba in the area of consumer protection law.

Harmonization of Law in Canada is only part of a much larger undertaking. As Director of the Law and Constitutional Issues Program, Dr. Ivan Bernier had the task of ensuring that the work of this section was integrated with that of the other sections. He discharged this task with skill and understanding. His unflagging optimism and good humour were instrumental in assisting his research coordinators through some difficult times.

Very complex logistics are associated with bringing several research papers through the many steps between first drafts and published studies. Without the constant guidance and assistance of Mr. Jacques J.M. Shore, Research Program Administrator and Executive Assistant to the Director of Research, the task would have been much more difficult if not totally unmanageable. I am indebted as well to the members of the editorial department (who did not always accept my prose and punctuation) and to the secretarial and administrative staff. Every request for assistance was met with a cheerful and prompt response.

R.C.

1

Harmonization of Provincial Laws, with Particular Reference to the Commercial, Consumer and Corporate Law

JACOB S. ZIEGEL

Introduction

Constitutional Background

This paper is concerned with Canadian experience in the harmonization of provincial laws with particular reference to selected branches of private law. Problems of harmonization do not arise in a vacuum. They are the products of many forces but, in Canada's case, probably the single most important factor is Canada's constitutional structure and judicial interpretation of the division of powers between the federal and provincial governments. Canada's founding charter is therefore an appropriate starting point for the theme of this paper.

The *Constitution Act, 1867*[1] divides legislative powers between the federal and provincial governments. There is little doubt that the Fathers of Confederation envisaged vesting in the federal government primary responsibility for directing the national economy and the creation of a powerful economic union, as well as other facets of government deemed by them to be of national importance.[2] To the provinces they reserved their pre-Confederation roles of regulating private law questions affecting property and civil rights "in the Province"[3] and matters "of a merely local or Private Nature."[4]

The *Constitution Act* mirrors these intentions quite faithfully and, had subsequent events not undermined them, it is doubtful whether the issue of harmonization of provincial laws would ever have assumed the importance which it enjoys today. As one reads the long list of powers specifically and, for the most part, exclusively conferred on the federal government in the *Constitution Act* — the regulation of trade and commerce,[5] navigation and shipping,[6] banking, incorporation of banks, and

the issue of paper money,[7] savings banks,[8] weights and measures,[9] bills of exchange and promissory notes,[10] interest,[11] bankruptcy and insolvency,[12] patents and copyrights,[13] criminal law,[14] interprovincial works and undertakings,[15] and works declared to be for the general advantage of Canada[16] — one cannot fail to be impressed by the strength of the founding fathers' commitment to a powerful economic union whose direction would repose in the hands of the federal government.

Given the division of powers and the restricted jurisdiction of the provinces, it is surprising that the Fathers of Confederation should have addressed their minds at all to the question of harmonization of provincial laws. We know, however, that section 94 of the *Constitution Act* empowers the federal parliament to make provisions for the unification of the laws in Ontario, New Brunswick, and Nova Scotia concerning questions of property and civil rights and rules of procedure. Not surprisingly, section 94 has remained a dead letter since the federal parliament cannot play its unifying role without the concurrence of the three provinces, a concurrence that is unlikely ever to be forthcoming.[17]

If the drafters of the *Constitution Act* were unduly sanguine about the possibility of the provinces voluntarily relinquishing their legislative powers, we cannot blame them for failing to foresee the magnitude of the distortions and strains in the rest of their constitutional design. The following post-1867 developments are particularly noteworthy. First, the Privy Council quickly and quite drastically reduced the scope of the federal government's trade and commerce power[18] and the peace, order and good government power in section 91 of the *Constitution Act*.[19] On the whole, with some modest leavenings,[20] this restrictive reading has been confirmed by the Supreme Court of Canada since appeals to the Privy Council were abolished in 1949. Second, under the guise of a judicially evolved "double aspect" doctrine, the courts have sanctioned provincial involvement in many of the important heads of power in section 91 of the *Constitution Act* and have done it, even in the face of concurrent federal legislation, by an equally restrictive rendering of the paramountcy doctrine.[21]

As a result, only provincial legislation which conflicts with federal prescriptions is liable to be struck down as constitutionally unacceptable, and only then to the extent of the incompatibility. Further, unlike American law,[22] Canadian constitutional doctrine has never permitted parliament to pre-empt a legislative area and to prevent provincial intrusions by the adoption of a simple statutory declaration to this effect. In brief, after more than a hundred years of constitutional adjudication, the provinces and the federal government are much more evenly matched in legislative powers than a literal reading of the *Constitution Act* would have suggested possible. Rightly or wrongly, successive generations of Canadian courts and members of the Privy Council have fostered the vision of a strong cooperative federalism in which the inter-penetration and duplication of

powers by the two levels of government were regarded as wholesome, and legislative and executive dysfunctionalism was accepted as a reasonable price for the greater evil of excessive centralism.

No doubt these developments have posed great challenges for successful cooperation in areas of common interest and legislative competence between the provincial and federal governments, and among the provincial governments themselves. However, constitutional factors explain only part of the picture. The rapid urbanization of Canadian society since World War I, the integration of the Canadian economy, the accelerating mobility of labour, capital, goods and services, the pace of scientific and technological changes, the establishment of a national safety net of social services — all have imposed continuing and growing demands for government intervention at all levels.[23] Much of the intervention has been in the public law areas, but not exclusively so. As will be shown later,[24] important branches of private law, particularly in the commercial, consumer, and corporate fields, have also been affected. Such statutory intrusion must perforce break the doctrinal unity which otherwise informs the private and public law of the common law provinces and, where relevant, of the federal government, and therefore increases the need for interprovincial harmonization of laws and for cooperation between the federal and provincial governments.

Given the nature of the Canadian economy and the structure of the *Constitution Act, 1867*, it is somewhat artificial to isolate a discussion of harmonization of provincial law from the problems generated by the duplication and overlapping of federal and provincial powers. Nevertheless, these are the terms of reference for this paper. It will focus on harmonization aspects of commercial and consumer law, corporate and securities law and, very modestly, insurance law from the perspective of the Canadian economic union. There are many formal and informal links that promote the harmonization of provincial laws, but this paper will concentrate on the best known, most visible, and most general of the agencies, the Uniform Law Conference of Canada, albeit in a comparative context and with some references to other interprovincial agencies.

The Need for Harmonization

It is easy to understand why the citizens of a federal state in which powers are divided between a central government and the constituent units should express the need for greater harmonization of laws and their administration. The phenomenon is not peculiar to Canada. It is likewise found in other English-speaking countries with a federal system of government,[25] just as the need for unification of private laws between sovereign states has been expressed and promoted in the international arena for more than a century.[26] Diversity of laws, overlapping powers, and uneven administration of similar laws create frustrations and vex-

atious delays. Such situations increase costs for enterprises doing business in more than one jurisdiction, for individuals moving from one province to another, and for transactions with multijurisdictional contacts. The obstacles are felt that much more keenly when they occur between members of an economic and political union which, in Canada's case, largely share a common language, common social values and a common legal culture.

The following three quotations, covering almost a century of experience and drawn from the United States, Canada, and Australia, reflect these frustrations and eloquently plead the case for uniformity of laws among the member units of the federation.

> The annoyance arising from variant and conflicting laws seemed common to all the states, viz: perplexity, uncertainty, confusion, with consequent waste; a tendency to hinder freedom of trade, and to occasion unnecessary insecurity in contracts, resulting in needless litigation and miscarriage of justice. As the answer of Mr. Colby, of New Hampshire, tersely puts it, "The continuing diversity of the laws of the various states and territories upon the subjects in question causes constant and gross waste of capital by suitors, and of skilled labor by bench and bar; occasions long delays, which are substantial denials of justice; facilitates various admitted immoralities, and issues in uncertainty of law, which Burke aptly describes as 'the essence of tyranny'."[27]

> The grievances caused by differing provincial laws are not felt by the larger business interests alone, by manufacturers, wholesale merchants, financial and transportation companies, insurance corporation and employers, and the like, but also by those dealing with them, shareholders and bondholders of companies, the insured, the borrowers and workmen; all are embarrassed by the different provincial laws to which their rights are subject.[28]

> In all or nearly all matters of private law there is no geographical reason why the law should be different in any part of Australia. Local conditions have nothing to do with it. Is it not unworthy of Australia as a nation to have varying laws affecting the relations between man and man? Is it beyond us to make some attempt to obtain a uniform system of private law in Australia?[29]

As may be elicited from these quotations, the advantages of uniform legislation are threefold. First, uniform legislation lowers the cost of doing business; second, it makes the law more predictable within each jurisdiction by providing a corpus of dependable judicial precedents for the guidance of officials, lawyers, and the business community; and third, it adds to the social capital of the nation by strengthening the legal and cultural ties among its citizens.

Nevertheless, the quotations must be read with two important qualifications. The first is that while the speakers vigorously articulate the burdens of non-uniform laws, they do not attempt to reconcile the essential paradox of expecting autonomous legislative regimes voluntarily to surrender their powers, nor do they provide a persuasive for-

mula to resolve the dilemma. This inherent conflict between provincial autonomy and subscription to national economic goals is well captured in the following observation by an Australian politician:

> I am suspicious of this phrase "co-operative federalism" which is referred to so frequently in the paper which you have presented, Sir. I am not sure that uniformity is, in fact, the answer. If uniformity is the be-all and end-all, and it seems to me that co-operative federalism in the context of this paper seems to boil down to uniformity, it makes one wonder what is the point of having States. We could not have wonderful social experimentation into such happy subjects, although I don't think there is any connection between daylight saving and abortion, but both South Australia and Tasmania have experimented, if that is the correct phrase, in both fields, and surely the founding fathers did at least anticipate that by retention of the States as separate entities, it wasn't going to be a matter of course that uniformity was going to be foisted upon us.[30]

The author of this quotation not only reminds us of the function and purposes of divided powers in a federal system, he also stresses the difficulty of balancing the advantages of local experimentation against the homogenizing and static effects of uniform legislation. There are also other difficulties that face the proponents of uniformity of provincial laws. One is that surprisingly little work has been done on the costs of non-uniformity. It is in fact very difficult to quantify the costs. It is equally obvious that the costs of divergent and overlapping laws vary greatly, and that in any given context they may constitute only a small part of the total costs of production and distribution of goods and services.

Another difficulty is that many of the victims of non-uniform laws are surprisingly passive about their fate. This may suggest that they are resigned to the inevitable, or that they find it more profitable to focus on larger issues. The cynic may argue that it also proves that harmonization has become an ideological battleground between those who favour greater concentration of power in the federal government and those who favour the retention of legislative powers at the provincial level.

These important themes will be pursued again in the concluding section of this paper.[31] I raise them at this preliminary point, not because I underestimate the value and advantages of uniformity but to caution the reader against a naive and simplistic view of the formidable hurdles that face the sustained achievement of uniform laws among the provinces and Territories of Canada.

The Meaning and Appropriateness of Harmonization of Laws

Harmonization of laws has several meanings. At the federal-provincial level, it means the dovetailing of federal and provincial legislative powers and the coordination of administrative schemes so as to avoid

duplication of laws and their enforcement at the two levels of government.[32] At the interprovincial level, it can mean uniform conflict-of-law rules so that, when confronted with a problem with multiprovincial contacts, the courts will know which provincial law to apply. This method of harmonization underlies the work of the Hague Conferences on Private International Law[33] and plays an important role in the international arena. However, it has never gained many adherents in Canada as a solution to the domestic diversity of laws, nor has it been seen as the appropriate answer in other predominantly common law jurisdictions with a federal system of government. The reason is that the common law provinces already enjoy a common (if not always particularly clear) body of conflict-of-law principles. An attempt to codify the principles could prove counter-productive by introducing rigidity where flexibility and adaptability are more important values. This approach would also do nothing to resolve the conflict betwen the divergent laws of the Canadian provinces, which is where the real problem lies from the point of view of the affected parties.

At the other end of the provincial spectrum, we have the search for complete uniformity of legislation in areas deemed to be important for the fluent conduct of trade and commerce. Obviously, in the absence of a compact between the participating jurisdictions, this is an unattainable ideal since, even if the participating jurisdictions begin with a uniform act, sooner or later pressure will be exerted for non-uniform amendments. The Canadian experience is that non-uniform amendments are also common at the time of adoption of a uniform act by individual provinces.[34]

Both phenomena — non-uniform amendments at the time of adoption of a uniform act and non-uniform amendments subsequent to adoption — are justified by some on the ground that, without the freedom to change or amend, the provinces could not be persuaded to support uniform legislation, and that what is important is that the provincial enactments be *substantially* uniform. In my view, the adequacy of substantial uniformity for the successful mobility of goods, services, capital and labour will depend on the nature of the legislation and the reason why uniformity is thought to be important. The problems may not be due to differences of a fundamental character. To illustrate, if the purpose of uniform laws is to enable business to be conducted in several provinces without the need to retain local lawyers or to draft separate forms for each province, then the objective may be effectively frustrated by an accumulation of small differences, such as periods of registration, the contents of financing statements, the effect of a change in the debtor's name, or the impact of an unauthorized transfer of the collateral on the perfection of a security interest — to cull some examples from the personal property security area.

Still another difficulty arises in seeking to determine which areas are suitable for legislative harmonization. There are alternative tests. The first is whether the benefits of greater uniformity will outweigh the loss of provincial autonomy. The second is whether there is likely to be sufficient support for a proposed uniform measure to make the effort worthwhile. So it is argued that uniform legislation with a strong social content (consumer credit, for example) is less likely to win support than legislation that is normatively neutral or that is based on commonly accepted values. Much of commercial law is said to fall into the latter categories. The practical nature of this approach is commendable, although one may question whether there is much in commercial law that is value free. However, this approach fails to surmount the difficulty that, from the point of view of the parties or their legal advisors, non-uniform legislation having a strong social content is more costly than divergences among less value-oriented provincial laws where substantial uniformity is often found even without the encouragement of a formally adopted uniform or model act.

A further observation needs to be made in order to put the scope of this paper in correct perspective. Complete uniformity may obtain in an area and yet it may not eliminate formidable barriers in the conduct of interprovincial business. It may in fact be the source of them. This will be true, for example, where provinces uniformly impose restrictions on the mobility of goods, labour or services, or adopt a policy of preferential treatment for locally sourced goods or services in provincial and local government procurement contracts.[35] Such discriminatory practices, even though they are uniform, may seriously weaken the Canadian economic union but they are outside this paper's terms of reference. The premise from which the discussion in the ensuing papers proceeds is that the legislative harmonization being sought is legislation that is non-discriminatory in character.

The Special Position of Quebec

Culturally and linguistically, Quebec has always been regarded as a distinctive province just as its civilian-rooted system of private law separates it from its common-law sister provinces. One consequence of this separateness has been that discussions of harmonization of provincial laws usually focus on the prospects of uniformity between the common-law provinces; the problems of bridging the gap between common law and civilian doctrines and organizing principles are regarded as too formidable to provide a fertile soil for effective synthesis. The omission of Quebec from the list of provinces in section 94 of the *Constitution Act* and Quebec's failure to become a regular member of the Uniform Law Conference until 1946 appear to support this pessimism.

While the problems are obviously different from those that inform the search for greater harmonization of laws between the common law provinces, it would be a serious error to dismiss the prospects of harmonization between the common law and civil law provinces as unrealistic. To do so is to ignore the fact that Quebec is not a pure civil law jurisdiction; its general principles of public law, including criminal law, are the same as those of the common law jurisdictions. In addition, because of the dominance of federal statutory law in the commercial law areas of banking, bills of exchange, and bankruptcy, Quebec here also moves in the same legal orbit as the rest of Canada. Further, important and growing areas of modern business and consumer law, such as corporations law, securities law and class actions law, are not rooted in distinctive common law or civil law doctrines but reflect functional solutions to contemporary problems. Not surprisingly, therefore, Quebec has found little difficulty in absorbing these types of law into its own legal structure.[36]

In brief, on an international scale of comparisons, the possibilities for effecting harmonization of laws between the common law provinces and Quebec in questions affecting the economic union are substantially better than, say, the harmonization of laws between the member countries of the European Economic Community[37] or the members of UNIDROIT.[38] The problems are not legal but political, and spring from attitudes of mind and the absence of compelling incentives to cooperate and to compromise on the part of the relevant governments.

Section 94 of the Constitution Act

Section 94 has already been referred to briefly. Some further description of its origins and subsequent history is warranted because of the light it throws on the general problem of the harmonization of provincial laws. Section 94 appeared as one of the Quebec Resolutions at the time of Confederation and, in F.R. Scott's view,[39] the provision shows that Canada's founding fathers rejected any theory of the watertight compartmentalization of federal and provincial powers. Rather, he argues,[40] its presence demonstrates that they regarded a full legislative union between the then common-law provinces as both desirable and feasible. Moreover, according to Scott's exegesis, had the political will existed, section 94 could have been interpreted to apply to the future as well as the existing provinces. Scott is therefore led to believe that "whatever may have happened to section 94 in the legal evolution of the constitution, it remains an outstanding political idea which formed part of the plans and aspirations of the men who built the nation from coast-to-coast."[41]

The first federal Parliament took section 94 seriously. In 1869 J.H.

Gray was appointed to prepare a preliminary report on the feasibility of unifying the laws of Ontario, New Brunswick, and Nova Scotia and $20,000 was appropriated by Parliament for the expenses connected with the work. Gray reported in 1871, and concluded that

> There can be no doubt that an excellent practical Code of Law, simple in its language, easily understood, expedient and economical in its administration could be formed from a judicious selection of the best laws of each of the provinces by men who were severally acquainted with each.[42]

Nothing further appears to have become of Parliament's initiative or the Gray report.

In 1902, on the motion of Benjamin Russell, member for Hants County, a proposal to apply section 94 was again made in the House of Commons.[43] No vote was called, however, and discussion was not followed by action.[44] What is particularly significant is that the motion was opposed by the minister of justice, Charles Fitzpatrick, on the ground that any action under section 94 would destroy the federal character of the constitution; one might as well ask the local legislatures, he remarked, "how soon they are going to be disposed to commit suicide."[45]

According to Scott,[46] since 1902 there have been no further attempts to activate the section. In fact, the provision is so widely dismissed as a realistic vehicle for promoting harmonization of provincial law that it barely receives mention in the leading constitutional texts and commentaries.[47]

Two lessons can be gleaned from these abortive attempts to breathe life into section 94. The first is that the provinces in a legal sense are indeed masters in their own houses and that, unless the federal government can invoke one of its powers under section 91 of the Constitution, uniform solutions can be achieved only by voluntary action among the provinces. The second lesson is that the same considerations that make the provinces unwilling to renounce their legislative powers in favour of a unifying federal role under section 94 also make them reluctant to give carte blanche to any interprovincial agency concerned with the harmonization of provincial laws, or to commit themselves in advance to adopt a uniform solution to a particular legal problem. One need not be a political scientist to ask the obvious question: why should they, and what are the inducements to engage in such seemingly altruistic behaviour? The question, of course, is oversimplified and it is misleading to describe the search for greater harmonization of provincial laws as an exercise in altruism. Nevertheless, there is enough substance in the question that it needs to be borne in mind in following the history of the Uniform Law Conference of Canada and in seeking to evaluate its accomplishments and its strengths and weaknesses. These are the themes which are addressed in the next part of this paper.

The Current Canadian Position

The Uniform Law Conference of Canada

The search for greater uniformity of provincial legislation in Canada began early. As early as 1910, federal and provincial officials discussed the feasibility of a uniform companies act.[48] The Superintendents of Insurance for Ontario and several of the neighbouring provinces first met informally for mutual consultations and an exchange of views in 1914, and this led to the establishment of the Association of Superintendents of Insurance in 1917.[49] It has met regularly since that time. From a uniformity point of view, the association's work has been most beneficial and it is largely as a result of its efforts that provincial insurance legislation in Canada has become and remained "remarkably successful."[50] The present Canadian Bar Association was founded in 1914 and, like its precursor, the American Bar Association, adopted the promotion of greater uniformity of provincial legislation as one of its principal objects.[51] The history of the period is replete with expressions of support for greater harmonization of provincial laws and it was a theme much stressed in the early years of that Association.[52]

It was also the Canadian Bar Association that promoted and was responsible for the establishment in 1918 of the Conference of Commissioners on Uniformity of Laws throughout Canada,[53] a body which, since 1974, has been known by the more manageable title of the Uniform Law Conference of Canada (hereafter "Uniform Law Conference" or "Canadian Conference").[54] The Canadian Conference was modelled on its American counterpart, the National Conference of Commissioners on Uniform State Laws (NCCUSL) which was founded in 1892, and has a similar purpose. The original purpose of the Canadian body was "to promote uniformity of legislation throughout Canada or among the Provinces in which uniformity may be found to be possible or advantageous."[55] The Canadian Conference began its life with a draft constitution but it was never formally adopted. The Uniform Law Section of the Conference has from time to time adopted or amended rules of organization and procedure,[56] but these rules appear to be applied quite flexibly. In fact, flexibility and informality remain distinctive features of the Canadian Conference.

However, since 1918 the Conference has expanded the scope of its activities and the promotion of uniform legislation is no longer its exclusive concern. In 1944,[57] on the recommendation of a committee of the Canadian Bar Association, the Conference established a Criminal Law Section to provide a forum for an annual exchange of views between federal and provincial officials on the operation of the criminal law at the federal and provincial levels and to make recommendations on the desirability of changes in the Criminal Code. In 1968,[58] the Conference also added a Legislative Drafting Section (LDS) to provide federal

and provincial legislative drafting counsel with a regular opportunity to discuss drafting problems and techniques. The LDS is also regularly called upon by the Uniform Law Section to provide on-the-spot advice on the drafting problems arising out of proposals for uniform legislation and to review draft uniform acts prepared by committees of the Uniform Law Section. As a result of these developments, the Conference now operates through three sections, the Criminal Law Section, the Uniform Law Section, and the Legislative Drafting Section, although the relationship between the latter two sections remains a close one. In terms of overall size, the Conference is still quite modest. About a hundred delegates attend its annual meeting,[59] of whom about half are accredited to the Criminal Law Section, and the other half to the Uniform Law and Legislative Drafting sections.

With a few exceptions, the Uniform Law Conference has met annually since 1918, usually in the summer shortly before the annual meeting at the Canadian Bar Association and, until comparatively recently, at the same place as or near to the annual meeting of the Canadian Bar Association.[60] Between its annual meetings, the affairs of the Conference are conducted by the officers of the Conference and its three sections, with the assistance of an executive secretary. The proceedings of the annual meetings are published regularly and are the single most important source of information about the work of the Conference.[61]

The Canadian Conference maintains close links with the American Conference and the two organizations frequently send at least one representative to each other's annual meeting. The Uniform Law Conference's early close links with the Canadian Bar Association, however, have not fared as well. The Canadian Bar Association is not formally represented on the Uniform Law Conference, and the ties between the two organizations currently amount to little more than a formal statement of activities that is presented to the annual meeting of the Association by the incumbent president of the Uniform Law Conference.[62] In fact, with modest exceptions, the Association appears largely to have lost interest in the Conference and in the problems of harmonization of provincial legislation.[63]

The Conference's relationship with the provincial and federal law reform agencies raises problems of a different order. As is discussed more fully below,[64] since 1964 all of the provinces and the federal government have established some kind of law reform capability although the resources and productivity of the agencies differ widely. The work of the agencies often impinges on the work of the Conference's Uniform Law Section. The question was early raised[65] whether the Conference should establish formal links with the law reform agencies and if so of what type. The consensus at the time was, and apparently remains, that formal links were neither necessary nor perhaps desirable, but that the Conference should be kept informed of the work of the law

reform agencies. There was no difficulty in implementing the latter decision since the heads of the law reform agencies, including the director of the Alberta Institute of Law Research and Reform, are ex officio delegates to the Conference. The effective coordination of the work of the law reform agencies and the Conference's Uniform Law Section remains, however, an unresolved challenge.

Initially, membership in the Conference was confined to the provinces,[66] although a province was free (and remains so) to designate its delegates from any source, governmental or otherwise, and frequently does. The federal government has participated in the Conference's proceedings since 1935 and is now a full-fledged member. Quebec was also intermittently represented between 1918 and 1942, since when it has been regularly represented by a member of the Quebec bar. The Quebec government itself became a regular member in 1946. The Yukon Territory and Northwest Territories joined the Conference in 1963. Initially the provinces appointed their representatives pursuant to statute or by an order in council and the representatives were designated commissioners.[67] Since the 1950s, in light of the expanding scope of Conference activities, both the provinces and the federal government have sent to the annual meetings a large number of non-commissioner delegates who apparently enjoy the same status as commissioners. The delegates are drawn predominantly from the ranks of government lawyers, including legislative counsel, deputy attorneys-general, crown prosecutors and others. As already mentioned, in recent years the chairpersons of the provincial and federal law reform agencies and the Alberta Institute of Law Research and Reform have been added ex officio by the jurisdictions to which they are accredited. Ex officio delegate status is also enjoyed by the attorney-general from each jurisdiction,[68] but their attendance at annual meetings of the organization is exceptional. Academics and practising members of the bar are in a small minority among the delegates. Intermittently, a judge has been designated a delegate but there is no judicial delegate at the present time (i.e. 1984). No sitting member of the Parliament of Canada and no sitting member of a provincial legislature has apparently ever served as a delegate.[69]

The delegates from any jurisdiction and the Canadian Bar Association may suggest a topic to the Conference's Uniform Law Section as a subject for uniform legislation.[70] In the past, most suggestions have been designed to harmonize existing and future legislation, but sometimes the Conference has seized the initiative in drafting a uniform act not based on extant legislation.[71] This trend may be expected to accelerate in the future. Examples falling into the latter category are the *Uniform Survivorship Act*, the *Uniform Regulations Act*, the *Uniform Frustrated Contracts Act*, and the *Uniform Human Tissue Gift Act*. The Conference has also become indirectly involved in the drafting of international conventions in areas falling within the provincial jurisdiction. In 1968,

Canada became a member of the Hague Conference on Private International Law and the federal government invited the Conference to designate one of its members as a member of the Canadian delegation.[72] The pattern has been repeated with respect to subsequent meetings of the Hague Conference. More recently, the Conference has also acceded to requests to help promote uniform law reform projects, particularly in the areas of sale of goods and products liability. This development is more fully described below.[73]

The Conference's Uniform Law Section is not currently bound by firm rules in determining whether to adopt a suggestion in favour of uniform legislation on a given topic.[74] The reactions from the other delegates, it is said, are a sufficient indication of the degree of support for the proposal.[75] This informal approach may be compared with the section's more rigid requirements imposed in 1954 as a condition to proceeding with a new drafting proposal. The requirements were:[76]

> (a) whether there is an obvious need for, or whether it is in the public interest to have, a uniform Act on the subject;
> (b) whether there has been any demand from any quarter for uniformity of legislation on the subject; and
> (c) whether there is any indication that the proposed enactment would have some likelihood of being enacted.

The Conference's method of dealing with a topic deemed suitable for uniform legislation has varied.[77] For many years, the established practice appears to have been to refer the topic to the delegates from one or more jurisdictions to prepare a draft uniform act on the basis of the policy questions determined at the meeting. The more recent practice is to seek expressions of interest from all delegates and then to strike a committee based on the replies. In either event, once a draft act has been prepared it will be scrutinized by the whole Uniform Law Section. The draft act may then be referred to the drafting committee (or, in earlier days, to another group of delegates) until an acceptable version is agreed upon and adopted by the section.

Until quite recently, the Canadian Conference's Uniform Law Section generally made no use of outside experts in the drafting of uniform acts and non-delegates played no direct role in the deliberative process. In 1974 an important change was brought about in these practices as a result of a research grant from the federal government of up to $25,000 annually, enabling the Conference to retain outside consultants and support some general research.[78] So far, the Conference has only made sparing use of this facility.[79] Whether or not outside experts are used in the drafting of legislation, the Conference appears to have been consistent over the years in not presenting a uniform act for public study before the act is finally adopted by the Conference.

Once a uniform act is adopted by the Conference, each delegation is

expected to advise its government of that fact and to provide it with a copy of the uniform act and the relevant materials relating to it.[80] However, delegates are not obliged to press for adoption of a uniform act by their respective governments. Whether a uniform act should be adopted is left to the discretion of each government and no pressure is brought to bear by the Conference on a jurisdiction to adopt a uniform act, to bring its existing legislation into line with a uniform act, or to desist from adopting non-uniform amendments if the jurisdiction has adopted the uniform act. The Conference does not regard itself as a lobbying body.[81]

The Conference's Uniform Law Section receives regular reports on judicial decisions affecting uniform acts.[82] While the authors of the reports are free to make recommendations for amendments to the uniform acts or the preparation of a revised act in the light of judicial or other developments, they rarely do so. Such initiatives usually come from other sources. As a result, many of the earlier uniform acts have been amended and a substantial number have been replaced by revised acts.[83]

As of 1983, the Conference had adopted 67 uniform acts, of which 52 were still current.[84] The others had been withdrawn as obsolete or had been taken over by other organizations. The 67 acts cover a wide range of topics ranging from Accumulations to Wills. They include administrative and constitutional law questions as well as private law matters, and the private law acts cover much more than commercial law subjects. They include such disparate topics as bills of sale, child abduction, condominium insurance, criminal injuries compensation, foreign judgements, information reporting, jurors' qualifications, and vital statistics. As a result, it is difficult to find a common denominator among the acts. It cannot be said they are all designed to promote the fluent conduct of trade and commerce among the provinces or the free movement of persons. It may not even be true of a majority of the acts. It would be tempting to argue that in some way they meet the 1954 criteria of satisfying an "obvious need," or that it was "in the public interest" to have a uniform act on the subject, but this too is unconvincing unless one accepts the proposition that legislative uniformity among the provinces is always in the public interest. The simple answer is probably that, in practice, the delegates do not agonize over the philosophy of uniform legislation but adopt a uniform act if they see it as serving a useful purpose and harming no provincial interest. Such a position is defensible, since no jurisdiction is obliged to adopt an act and the worst that can happen is that the act remains inoperative.

The Conference operates on a modest budget. Until the mid-1970s, most of the provinces and the federal government each contributed $1,500 per year, and the poorer or smaller provinces $750 each.[85] As late as 1976, the annual contributions only amounted to $17,250.[86] Since then, the annual contribution from most members has increased to $4,000 per year. As a

result, the annual revenue of the Conference had grown to $53,634 in 1983,[87] but it is still less than one-tenth of the annual budget available to the National Conference in the United States.[88] The Uniform Law Conference has no full-time secretariat. Instead it has the services of a part-time salaried executive secretary[89] and, at the annual meetings themselves, the translation services of the Canadian Intergovermental Conference Secretariat. Likewise, the Conference has no independent research capability and, for the most part, it must rely on the willingness and availability of the commissioners and other delegates to combine voluntary work for the Uniform Law Section with the discharge of their own regular professional duties. As previously mentioned, since 1974 the federal government has made available to the Conference an annual research grant up to a maximum amount of $25,000. This has enabled the Conference to hire outside consultants for special projects and to pay the travelling expenses of non-delegates serving on special committees. It is open to debate, however, whether the federal grant is sufficient to meet the Conference's needs, whether it constitutes a dependable source of long-term funding, and whether it is an adequate substitute for in-house research capability by the Conference.

Critique of the Work of the Uniform Law Conference

At first glance the achievements of the Conference look impressive, and there can be little doubt about the importance of the Conference as a vehicle for the harmonization of provincial law and as a source of model legislation. Nevertheless, closer examination reveals that the Conference has not been as successful as one might wish in securing and maintaining uniformity of law in Canada even among the common law jurisdictions.

As of 1983 the Conference had approved 56 uniform acts which were still current and most of these had been adopted to some extent by a substantial number of the Conference's members.[90] However, these figures are not as significant as they appear at first sight. Only one uniform act (on Reciprocal Enforcement of Maintenance Orders) has been adopted by all the Canadian jurisdictions and two uniform acts have not been adopted in any jurisdiction.[91] In fact, the number of uniform acts that have been adopted in six or more of the Canadian jurisdictions (a total of 26) is less than the number of acts (29) that have been adopted in five or fewer jurisdictions. Moreover, many of the uniform acts were only adopted in part or with various amendments. In other cases, non-uniform amendments have been added by individual jurisdictions since the time of adoption of the uniform acts. It has also been pointed out,[92] in the context of the Conference's efforts in the conditional sales area, that substantial uniformity is likely to occur in any event, even without the Conference's intervention, because of the

TABLE 1-1 Adoption of Uniform Acts or Similar Legislation as of August 1983, by Jurisdiction

	Number of Jurisdictions	Number of Acts Passed	Number of Acts Passed (as % of total)
	0	2	3.57
	1–3	13	23.21
	4–6	19	33.93
	7–9	14	25.00
	10–11	7	12.50
	12	1	1.79
Totals	12	56	100.00

Source: Compiled by the author from information in the Proceedings of the 65th Annual Meeting of the Uniform Law Conference of Canada in August, 1983.

Notes: This table includes acts adopted in whole or in part and with or without modifications.

The 12 jurisdictions covered by this table are all the provinces and the Yukon Territory and the Northwest Territories. The Canadian government is not included among the jurisdictions although it is a member of the Conference. As of August 1983, the federal government had adopted the provisions in the Uniform Evidence Act on Foreign Affidavits and Photographic Records, and the Uniform Regulations Act. The latter was subsequently superseded by the Statutory Instruments Act, S.C. 1971, c. 38. See ULC Proc. 1983, Table IV, p. 300.

tendency of the smaller jurisdictions to copy the legislation of the more populous provinces. (See the Table of Adoptions.)

It would be tempting to ascribe the Conference's uneven success to weaknesses in its structure and procedure. As argued later in this paper, this is a mistaken view, and U.S. experience shows that a more sophisticated structure does not guarantee greater success. Nevertheless, to the extent that structure and procedure are important factors, it must be conceded that the Conference's effectiveness is limited by significant constraints. The following features deserve particular mention.[93]

Inadequate funding Judged by the importance and growing range of its work, it must seem obvious that the Conference has been seriously underfunded during much of its existence. Even an annual budget of $50,000 does little more than cover clerical costs, the costs of preparing and printing the annual proceedings of the Conference, and paying the executive secretary a modest honorarium. It leaves no room for developing a permanent in-house research capability, and in this respect the resources of the Conference compare unfavourably with those at the disposal of the active law reform agencies in Canada. It is true of course that the delegates themselves, and the ad hoc committees established by the Conference's Uniform Law Section, contribute experience and voluntary work. However, too much is expected from these sources, and they would function more effectively if the Conference were able to supplement their efforts with those of its own staff and with assistance

provided by outside expert consultants. Admittedly, the annual research grant provided by the federal government makes good some of these deficiencies, but it cannot be regarded as a long-term solution to the Conference's staffing and financial needs. For one thing, the grant could be cut off at any time, and for another it is not obvious why the federal government should be expected to finance on its own the Conference's more ambitious projects. The burden should surely be distributed more equitably.

The fact that the member governments of the Conference appear to be reasonably content with the status quo is revealing in several respects. It suggests that they do not take the work of the Conference too seriously,[94] and that they do not view the achievement of harmonization of provincial law as warranting the investment of substantial financial and human resources. Seen from this perspective, the retention of a small budget and the absence of a permanent staff actually serve the members better. It reinforces the ackowledged position that no member government is under any obligation, legal or moral, to adopt a uniform act. A well financed and better staffed Conference might well be seen as giving out wrong signals.

Too narrow a constituency The Conference's goal of seeking widespread adoption of its uniform acts is incompatible with its narrow delegate base. A more representative constituency, one that would include a substantial number of practising lawyers, academics, elected members of legislatures as well as the existing component of government officials, would have two beneficial results. First, it could be expected to improve the quality of some of the uniform acts by bringing to bear on the topics a wider range of practical experience and specialized skills. Second, it would make the work of the Conference better known and strengthen the prospects for successful adoption of uniform acts by the member governments.

Inadequate consultation The Conference has never adopted a policy of distributing draft uniform acts for general discussion and reaction by outsiders before the drafts are finalized, and this omission is difficult to understand. It seems surprising, for example, that the Conference's uniform law section should have given its seal of approval to such important uniform acts as the (revised) *Uniform Sale of Goods Act* (1981), the first *Uniform Personal Property Security Act* (1971), or the *Uniform Personal Property Security Act 1982* (jointly sponsored by the Conference with the Canadian Bar Association) without first widely disseminating the draft acts and allowing ample time for reaction and comment by outside parties.

The restrictive practice of the Canadian Conference compares unfavourably with the practice of other bodies concerned with uniform

legislation. The experience of the National Conference in the U.S. shows that the general dissemination of draft uniform acts is a valuable vehicle for attracting public interest and informed comment even if the amount of outside comment is small. The experience of the Association of Superintendents of Insurance in Canada[95] also proves the value, psychological as well as practical, of holding open meetings with those who may be affected by uniform legislation.

One consequence of the Conference's failure to consult widely before approving uniform legislation is that the legislation may encounter strong opposition when it is introduced provincially or federally for adoption, and that the Conference may be accused (probably quite unfairly) of being biased or ignoring opinions other than those of its own members and their delegates. This happened with respect to the Uniform Evidence Act drafted by the Federal-Provincial Task Force on Uniform Rules of Evidence, and the Draft Uniform Evidence Act approved by the Conference in 1981.[96] The act was introduced by the federal government in the Senate in 1982[97] and was then criticized by the Canadian Bar Association, in hearings before the Senate committee, on the grounds inter alia that its members had not been consulted during the drafting of the legislation.[98]

Inadequate expertise Since most of the Conference delegates are drawn from government circles, they may not have expertise in the private law areas on which they help to draft uniform acts. This difficulty would arise even if a greater number of delegates were drawn from academia or the practising bar. The answer would appear to lie in the establishment of a series of standing committees for each of the main areas of private law into which the Conference's Uniform Law Section has extended its activities, and to ensure that each standing committee has a nucleus of experts in its allotted field, whether drawn from existing delegates or co-opted to the committee from outside the Conference. The suggestion is far from novel. The practice appears to be followed by the National Conference in the United States[99] and, so far as the co-option of outside experts are concerned, has already been adopted by the Canadian Conference in determining the composition of special committees whose work is funded from the special research fund. Apparently, lack of funds has so far discouraged the Conference from extending this principle to the general work of its Uniform Law Section. A concern that the section could become too unwieldy may also be a contributing factor.

Non-involvement in important views There are many important areas of private law, or mixed areas of public and private law, in which uniformity would serve a useful purpose but which have not so far attracted the Conference's attention. This would not matter if other

bodies filled the gap, but often they do not. For example, many facets of consumer law, including consumer credit law and trade practices legislation, need conceptual clarification and greater interprovincial uniformity. There should be some mechanism at the interprovincial level, provided by the Uniform Law Conference or some other body, through which there could be systematic reviews of those areas of provincial law in which inadequate progress has been made in securing basic uniformity and in ensuring that the problem is addressed by some responsible interprovincial agency.

Lack of political commitment As already noted, since at least 1975 the delegates have agreed to notify their respective governments when the Conference has approved a new uniform act. Their obligations, however, do not extend beyond this modest point and it is unusual for delegates to lobby their governments actively to enact uniform legislation. Both for this reason and for others explored below, the recommendations of the Conference's Uniform Law Section have not met with as much acceptance among the provincial governments as might be wished. Successive presidents of the Conference have frequently commented on this deficiency and have lamented the failure of their member governments to support uniform legislation more vigorously.[100] One source of difficulty may lie in the ambivalence of delegates toward the importance of their work;[101] if this diagnois is correct, it is an attitude that requires consideration. It is not unusual, for example, to find a delegate participating in work on a draft uniform act at the Conference level and drafting or promoting a non-uniform act, or a non-uniform amendment to a uniform act, in his other capacity at the provincial level!

In fairness to the delegates it must be recognized that not all of them occupy senior governmental positions. Even if they did, the governments by whom they are accredited to the Conference would not expect them to become lobbyists and might even regard it as unseemly conduct on the part of civil servants. A further difficulty is that a province that already has legislation which appears to be working well may see no advantage in withdrawing it in favour of a newly minted uniform act. The shoe may well be on the other foot. However, the greatest obstacle to the wider adoption of uniform acts lies in the attitudes of the attorneys general. Although they are ex officio delegates to the Conference, they rarely attend its meetings and, judging by the available evidence, they almost never meet collectively to decide the fate of a uniform act. In this respect, there is a vital difference between the Uniform Law Conference and the Standing Committee of Commonwealth and State Attorneys General in Australia.[102] The Canadian attorneys general may in fact see considerable advantage in distancing themselves from the work of the Uniform Law Conference. As politicians, they owe their first loyalty to the government of which they are members and to the cultivation of their

own careers. Their order of priorities may leave little room for the promotion of uniform legislation; its pursuit could also bring them into conflict with local interests. Even if generally well disposed toward the work of the Conference (and most of them probably are), they may view it as politically inconsequential and therefore not deserving of serious attention.

Non-uniform amendments This is a problem that is endemic to all voluntary efforts at harmonization at the provincial level[103] and is one that is shared by other federal systems of government. It is more acute in Canada because the members of the Uniform Law Conference are not obliged to consult the Conference before an amendment is adopted or even to report the amendment to the Conference after its adoption. These omissions suggest a degree of casualness, or resignation to the inevitable, which is inconsistent with a firm commitment to the principle of uniformity.

One partial solution adopted in the United States to discourage non-uniform amendments to the Uniform Commercial Code is the establishment of a Permanent Editorial Board by the two sponsors of the Code.[104] The function of the Board is to review all unauthorized amendments at the state level and to propose amendments of its own. While it would be far-fetched to suggest that the Permanent Editorial Board has been able to slow the flow of non-uniform amendments,[105] it undoubtedly serves a useful purpose. The Uniform Law Conference might consider establishing a standing committee with a similar function, at least with respect to those acts where interprovincial legislative harmony is of particular importance.

Relationship with law reform agencies This raises issues of such fundamental importance to the future of interprovincial uniformity of legislation that it deserves a section of its own, which follows.

The Challenge of the Law Reform Agencies

From 1964 onward, the provinces began to develop institutional facilities to review in depth significant parts of the law and discrete topics in need of reform, and to make recommendations for their modernization. At the present time a majority of the provinces[106] have established some form of law reform capability although the agencies differ considerably in structure, size, funding, and levels of productivity. Since they are provincial institutions, accountable mainly to their respective governments, knowledgable observers have rightly detected in their establishment a new and unexpected threat to interprovincial uniformity of legislation.[107] The difficulties are twofold. The first is that not infrequently law reform agencies have duplicated each other's work by researching and

reporting on the same topic.[108] This is an inefficient use of scarce resources, but is perhaps unavoidable. No law reform agency would react kindly to the suggestion that it should abstain from examining a topic because the work is already being done, or has been completed, in another jurisdiction. At the very least, it would wish to satisfy itself that it agreed with the conclusions of the other agency. Suggestions have been made in favour of a coordinating agency, and I examine its feasibility below.

The second difficulty presented by the multiplication of provincial law reform agencies is much more serious. As each agency presents its report on the same topic, there is a real danger that there will be as many solutions as there are reports. The reform of matrimonial property law over the past decade illustrates the dilemma.[109] A majority of the provinces, including Quebec, have legislated in the area and no two acts are identical. The result has been described by a distinguished scholar as "little short of a national calamity."[110] Other law reform activity will justly incur the same reproach if it leads to a similar balkanization of private law areas that have hitherto enjoyed substantial common law doctrinal uniformity.

What is the solution? One author[111] has recommended the establishment of a coordinating committee by the law reform agencies that would seek to avoid duplication of research work by farming out selected topics among one or more of the law reform agencies. The resulting reports would then be made available to all the other agencies for their comments and reactions. It may be doubted, however, whether this is a feasible plan.[112] The research resources of the various law reform agencies differ greatly and it is unlikely that the larger and more experienced agencies would readily forgo the freedom to choose their own researchers. There is also the difficulty of successful cooperation between researchers who may be living at opposite ends of the country.[113] Even if these hurdles can be overcome, it still leaves unresolved the question of how the agencies are expected to reach agreement on one set of recommendations. Each agency would feel statutorily bound to give the issues its own best consideration and not to abdicate its authority in favour of the coordinating committee. The alternative would be an exploratory set of recommendations from the coordinating committee that would not be binding on the individual law reform agencies. It is difficult to believe that this replication of the Uniform Law Conference model would carry much appeal. A more effective long-term solution would be for the provinces to establish an adequately funded and staffed interprovincial law reform agency that would conduct its own research, make its own recommendations, and report directly to the member governments on questions of common concern to them.

In the meantime, Ontario has begun to pave the way for a constructive union between the Uniform Law Conference and the work of individual

law reform agencies.[114] In 1979, the Ontario Law Reform Commission submitted its report to the Ontario government on a revised Sale of Goods Act.[115] The report included a recommendation[116] that the draft act be brought to the Conference's attention with a view to the Conference adopting it as the basis of a revised Uniform Sale of Goods Act. The Conference accepted the invitation and, with the cooperation of the law reform agencies, struck a special committee made up substantially of commercial law experts to review the Ontario draft act and to make recommendations. The committee's expenses were partly met out of the Conference's research fund. The committee reported favourably in 1981 and recommended the adoption of an amended version of the Ontario draft act as a revised Uniform Sale of Goods Act. The recommendation was accepted[117] and the revised Uniform Sale of Goods Act joined the stable of approved uniform acts in 1982.[118] In 1982 and 1983 respectively[119] the Alberta Institute of Law Research and Reform and the Manitoba Law Reform Commission supported adoption of the uniform act in their jurisdictions, albeit with some amendments and subject to an important condition.

Ontario again followed a similar procedure in seeking Conference support for its proposals to revise the law of products liability.[120] In this case, however, the Ontario report followed the adoption in Saskatchewan and New Brunswick of consumer product warranties legislation containing product liability provisions not based on traditional sales law principles. After extensive consideration of the issues by successive committees, the Conference approved a *Uniform Products Liability Act* in 1984.[121]

From the foregoing, it will be seen that Ontario has found a way to marry the requirements of progressive reform of private law with the search for uniformity. There is no reason why other law reform agencies should not be able to follow these precedents. It has been suggested[122] that the provinces might resent being asked to endorse the work of a single law reform agency, but if this is a real difficulty it appears to have been successfully overcome in the sales and products liability areas. What made it easier for the Conference to accede to the Ontario requests was the fact that there were no competing reports on sale of goods and products liability by the other provincial agencies. It is not clear how the Conference would react if it were confronted with divergent law reform proposals on the same topic.[123] One would hope that a similar procedure would be followed as for the Ontario requests, and that a committee of experts would be asked to evaluate the reports and to adjudicate on their respective merits insofar as they differ from one another. The problem does not seem insoluble.

One feature of the Conference's procedure in dealing with the Ontario law reform proposals remains troublesome. As previously noted, the Conference approved the special committee's report on revision of the

Sale of Goods Act without inviting outside comments. Such unseemly haste must surely invite criticism and lower the credibility of the uniform acts in the eyes of those diverse groups that may be urged to support their enactment at the provincial level.[124]

International Dimensions

In recent years the Conference has faced a challenge on another front, although one with more familiar contours. In the postwar era, with its greatly increased flow of international trade and investment, numerous efforts have been made to facilitate and simplify the legal aspects of international commerce through the conclusion of multilateral conventions. Many of these conventions involve questions of commercial law otherwise falling within the provincial jurisdiction. The challenge that faces the federal and provincial governments is how to secure Canada's accession to such treaties and to ensure uniform provincial action.

The only explicit reference in the *Constitution Act* to international treaties appears in section 132,[125] and this was held by the Privy Council in the International Labour Conventions[126] case to be limited to imperial treaties signed by the United Kingdom before Canada acquired its own international legal personality. The Privy Council also ruled that the federal government lacked constitutional authority to bind the provinces by treaty on subjects falling within the provincial jurisdiction. There are numerous dicta,[127] both preceding and subsequent to the *International Labour Conventions* case, that question this aspect of the Judicial Committee's decision. The decision has also been criticized by constitutional law scholars.[128] Nevertheless, the federal government still treats the decision as binding. As a result it conscientiously follows a policy of not ratifying treaties in the international trade law area (as well as other areas) that impinge on provincial jurisdiction without the concurrence of the provinces and, where relevant, without supporting legislation by them.

To secure the necessary degree of federal-provincial cooperation and to satisfy international treaty law requirements the federal government has, since 1972, negotiated for the inclusion in multilateral conventions of a suitable "federal state" clause.[129] The clause acceptable to Canada provides that if a contracting state has two or more territorial units which have their own rules in respect of the treaty subject matter it may, at the time of signature, ratification or accession to the treaty, declare that the Convention shall extend to all its territorial units or only to one or more of them. The Convention on Contracts for the International Sale of Goods,[130] signed at Vienna at 1980, is an important example of an international convention containing this type of federal state clause.[131]

The federal government has established an advisory committee of

federal and provincial representatives to advise it on international law questions involving the provincial jurisdiction, and it also follows a practice of consulting the provinces both before and after the conclusion of international conventions. The federal government will urge the provincial governments to support conventions with provincial subject matter, but it will not sign or ratify such conventions until at least one or more of the provinces have agreed that the Convention should apply to them. So far only two multinational conventions[132] have secured this threshold degree of provincial cooperation. The role of the Uniform Law Conference itself in urging adoption of such conventions by the provinces has been uneven. In the case of the International Sales Convention, for example, the Conference was officially advised of the conclusion of the convention[133] but has so far taken no step to recommend adoption of the convention by the provinces under the terms of the federal state clause.[134] Even were it to do so, it is unlikely the recommendation would have much effect without some vigorous lobbying by interested groups. While the federal state clause may work tolerably well in the family law area and in other questions with a relatively localized impact, the difficulties of applying it successfully in the international trade law area are formidable. In the writer's view, the problem deserves more serious and intensive attention than it has received so far.[135]

The Unifying Role of the Supreme Court of Canada

One of the characteristics of the Supreme Court of Canada that distinguishes it from final appellate tribunals in other federal jurisdictions is that it is authorized to hear appeals from provincial courts on questions of provincial law. This is true even though the Supreme Court is exclusively a federal creation and its judges are appointed by the federal government.[136] The Supreme Court is therefore endowed with important powers in maintaining doctrinal uniformity among the common law provinces, and it has played this role since it was established in 1875.[137] Prior to the amendment of the *Supreme Court Act* in 1974,[138] there was a right of appeal from a final judgement of the highest court of final resort in a province where the amount or value of the matter in controversy exceeded $10,000.[139] Since that time, appeals from any final or other judgement of such court can only be prosecuted with the leave of the Supreme Court or, in the case of an appeal from a final judgement, with the leave of the provincial court whose judgement is being appealed.[140]

It is difficult to assess the importance and impact of the unifying role of the Supreme Court. In the past, provincial courts have been very deferential to British decisions,[141] often to the point of preferring a British precedent to a competing decision from another provincial court, and for many years the Supreme Court also laboured under the shadow of the British legacy. Moreover, until 1949, when appeals to the Privy Council were abolished, the Supreme Court was bound by decisions of the

Judicial Committee. Appeals *per saltum* were also possible directly to the Privy Council from decisions of the highest provincial courts, thus further undermining the authority of the Supreme Court. In addition, an increasingly smaller number of private law cases reach the Supreme Court and opportunities for it to play its unifying role have become progressively more intermittent.[142]

Some of these factors have changed of course. The Supreme Court is now master in its own house, the opportunities for doctrinal conflicts between provincial courts are more common,[143] and the Supreme Court is no longer as beholden to British decisions as it was before the Laskin era. Nevertheless, the number of occasions on which provincial courts or the Supreme Court have consciously departed from British precedents is still small.

Some new factors have also emerged. One is the growing area of common law pasture that is falling under the statutory plough. If the provincial legislation is not uniform, obviously a decision of the Supreme Court interpreting a statutory provision will have little or no precedential value in the interpretation of the acts of other provinces. Another difficulty is the heavy case load of the Supreme Court and the demands of public law appeals, which have been accentuated since the enactment of the Canadian Charter of Rights and Freedoms.[144] On average, the Supreme Court has been hearing about 120 cases a year.[145] Less than a third of them have involved private law issues from Quebec and the common law jurisdictions, and that relatively small handful may cover the full spectrum of the *Code civil* and all branches of the common law. In recent years Canadian scholars have also expressed concern[146] that pressure of work may prevent the Supreme Court from giving private law questions the close attention they deserve, and that the judgments are not always as well reasoned or adequately researched as might be wished.

In my view, none of these developments should be interpreted to mean that the Supreme Court should abandon its unifying role. Quite the contrary. I believe that the need for a final court of appeal from the decisions of provincial courts is probably greater than before.[147] What they do mean is that the Supreme Court will have to reorganize its case load, or hold concurrent hearings, if it is to be able to continue to discharge its statutory mandate. Another possibility would be the establishment of an interprovincial appellate tribunal to hear appeals purely on questions of provincial law. In the concluding part of this paper,[148] both these possibilities are explored more fully.

Other Unifying Sources

It will be convenient at this point to refer to three other sources of unifying influences to illustrate the perhaps obvious fact that the Uniform Law Conference and the Supreme Court of Canada, while perhaps the best

known of the agencies promoting harmonization of doctrine and legislation among the provinces, are not the only forces at work but are joined by many others. Of the three sources to be briefly examined here, the role of one, the Canadian Bar Association, has already been alluded to. The other two are Canadian law schools and Canadian legal scholarship.

The Canadian Bar Association

There were in fact two such associations. The first Canadian Bar Association was founded in 1896, but apparently only lasted two years.[149] The second Canadian Bar Association was formed in 1914[150] and is still alive and well. What both associations had in common at their inception was a strong belief in the virtues of uniform provincial laws, particularly in areas affecting trade and commerce, and a willingness to play an active role in promoting this goal.[151] Had the first association survived longer, it might well have been the catalyst that led to the creation of the Uniform Law Conference; instead, this distinction was left to its successor.

The early links between the Canadian Bar Association and the Conference remained strong for many years, and at least three presidents of the association have also served as presidents of the Conference.[152] For reasons that are not clear, the cordial relationship between the two organizations has cooled during the past decade or so. This gulf was accentuated by the Conference's objections to the nature of the representations concerning the *Uniform Evidence Act* made to a Senate committee by the Canadian Bar Association in 1983. The difficulties were deemed sufficiently important to attract attention in the Conference's presidential address later that year.[153] The records of the Canadian Bar Association also indicate that the association has lost its earlier interest in harmonization of provincial laws as a goal warranting its serious efforts. In the writer's experience,[154] it is now largely regarded as an academic topic. Significantly, although the association has 22 sections,[155] it has none on uniform provincial legislation; and the committee on the subject that the association used to have has long since been disbanded.

There are probably a number of reasons for the association's declining interest in the Conference's work and in uniformity of legislation. One is that Canadian law has become much more complex and as a result lawyers have become more specialized; lawyers tend to think in terms of particular problems and the impact of diverse provincial legislation on their solution rather than in terms of the grand picture. The Canadian Bar Association has also become much more conscious of its public profile. Consequently, the organization tends to pursue issues that are in the limelight, such as the Charter of Rights and Freedoms, freedom of information legislation, and improvements in the system of selection of judges. Not surprisingly, harmonization of provincial legislation receives short shrift amidst such competition.

All this is not meant to suggest that the Canadian Bar Association should be written off as a constructive influence in this area. Individual members of the Association, various provincial subsections, and committees such as the Joint Committee on the Uniform Personal Property Security Act, 1982[156] retain an active interest in selective aspects of uniformity. Likewise, lawyers representing clients doing business in more than one province may be expected to have a lively appreciation of the costs of non-uniform laws. However, their interests will be functional, not ideological. This is why it is desirable for the Conference to involve practising lawyers much more extensively in the work of particular committees of the Conference, and to avoid the types of recriminations that have occurred in connection with the uniform evidence project.

The Role of the Law Schools

The potential influence of Canadian law schools differs markedly from the influence of the Canadian Bar Association. Like other aspects of Canadian legal life, the law schools have also experienced major changes over the past 25 years. The number of law schools has increased significantly[157] and the overall enrollment of law students has grown from 2,896 in 1962–63 to 9,351 in 1976–77.[158] At the same time, part-time law schools, or law schools that combined academic instruction with a system of apprenticeship,[159] have been eliminated. The number of full-time law teachers has quadrupled.[160]

The relevance of these changes lies in the influence of law schools on legal eduction and on their students' perceptions of the law. While some law teachers still give primacy to the law of the province in which the school is situated (where provinical law is relevant), the great majority stress legal principles and the teleological purposes of legal rules.[161] Provincial legislation is treated as illustrative of legal solutions, and teachers and course materials draw freely on the case law precedents and statute law of many jurisdictions in order to give a balanced view of the legal mosaic.[162] This approach has long been used in the leading American law schools[163] and its effect is twofold: first, it gives students a thorough grounding in legal principles and, if they have been trained in a common law school, equips them for practice in any of the common law provinces. Second, it encourages them to think in terms of *Canadian* law rather than the law of a particular province and makes them receptive to concepts of harmonization and sensitive to the costliness of needless and idiosyncratic diversity.

The Influence of Legal Scholarship

Canadian legal scholarship too has made great strides in the past 25 years. Before then, there were relatively few Canadian textbooks and

monographs of national stature and even fewer had high scholarly credentials. There were no serious textbooks at all in many branches of Canadian law and both practitioners and students were forced to rely heavily on British and American texts. All this has changed.[164] The number of reputable Canadian texts now runs in the dozens and, while much still remains to be done, most branches of Canadian law are covered by least one creditable text. Some are of outstanding quality and compare favourably with the best in the common law world. Canadian legal scholarship also finds a ready outlet in the numerous law reviews with which the country is blessed, and judges and practitioners increasingly rely on Canadian legal scholarship in their search for answers to contemporary problems. Law reform agencies also rely heavily on the expertise of legal scholars in seeking to keep the law abreast of current needs.

It is in the nature of legal scholarship that it is national, if not international, in scope and that it is not confined by the accidents of geography and the idiosyncracies of local drafters. There is another factor that militates in favour of a national approach, and this is that most provincial markets are not large enough to justify the costs of publication of texts limited to the law of one province. The effects of all these developments are obvious. Legal scholarship clarifies and systematizes existing law, and helps to give it a sense of direction. By focussing on the national scene, it also emphasizes the rational and purposive character of the law and the inherent unity that informs, or ought to inform, provincial legislative activity in the private law sector. In short, most legal scholars, by inclination, are also strong supporters of uniform provincial legislation where the issues being addressed are common ones and there are no persuasive reasons to justify local departures.

A Functional Overview

The discussion so far has emphasized the conceptual and institutional aspects of the search for harmonization of provincial laws. This section will focus on the functional aspects of the efforts, and will attempt to describe the impact they have had on the commercial, consumer, insurance, and corporate and securities areas of provincial law.[165] Several of these areas are covered by individual research papers undertaken for this Royal Commission. My purpose is not to repeat what is said in them, but to fill in some gaps and to provide a general overview of the state of provincial legislation and its relationship to the federal statute book.

Commercial Law

Commercial law is not a term of art and, as commonly understood, includes all those areas of the law related to or involving the provision of

goods or services for profit. The federal role in this branch of the law is particularly pronounced, and the federal government has exclusive or paramount jurisdiction over the interprovincial and international aspects of trade and commerce,[166] banks and banking,[167] bills of exchange and promissory notes,[168] interest,[169] insolvency and bankruptcy,[170] and navigation and shipping.[171] The federal government has legislated extensively in all these areas.

Two important areas in which the provinces have legislative jurisdiction are the sale of goods and personal property security law. Sales law is substantially uniform among the common law provinces and the Territories since all of them have adopted the British *Sale of Goods Act, 1893*.[172] Important parts of the act are badly outdated[173] and British precedents may cease to be relevant in view of the many changes to the parent act adopted in the United Kingdom in the postwar period.[174]

There is need, therefore, in Canada for a revised Sale of Goods Act. In the United States, Article 2 of the Uniform Commercial Code met this need when it arose among the American states in the late 1940s and early 1950s.[175] As noted, the Ontario Law Reform Commission published its proposals for a revised Sale of Goods Act in 1979, and these were accepted as the basis for the Uniform Sale of Goods Act approved by the Uniform Law Conference in 1981.[176] Little has happened since then, except that the Alberta[177] and Manitoba[178] law reform agencies have issued reports indicating, with modest exceptions, their support for the adoption of the uniform act in their jurisdictions. Ontario has not shown its hand and, without Ontario leadership, it is unlikely that the other provinces will enact the uniform act. The real danger is that as the pressure mounts for changes to the 1893 act, the provinces will be tempted to adopt piecemeal non-uniform amendments. The Uniform Law Conference should be lobbying vigorously to maintain uniformity in this core branch of commercial law; unfortunately, it has done little. Its failings in this respect are a good example of the consequences of its self-imposed fetters not to lobby individual provinces but to allow the merits of uniformity to sell themselves.

What is a potential danger in the sales area has become a realized misfortune in the personal property security area. The details of this sorry tale appear in Professor Cuming's research paper.[179] Certain features are worth emphasizing. Canada currently has the dubious distinction of having *four* different regimes of personal property security law — the pre-PPSA law (Maritime provinces, Alberta, British Columbia), the PPSA law (Ontario, Manitoba, Saskatchewan, and the Yukon Territory), the Quebec civil law, and the federal personal property security provisions, principally those in the *Bank Act*.[180] The picture is further complicated by the fact that the provincial personal property security acts are not uniform; there are numerous differences in detail among the Ontario, Manitoba, and Saskatchewan acts. The differences will be accentuated

if the draft revised Personal Property Security Act, prepared by the Minister's Advisory Committee in Ontario,[181] is enacted in that province.

Since many financial transactions have interprovincial dimensions, one might have expected the financial community as well as the Uniform Law Conference and members of the commercial bar to be concerned about so much diversity. Disappointingly, all three sectors have been noticeably silent, even complacent. This suggests either that the costs of non-uniformity are not as significant as is generally assumed, or that the costs are being absorbed by borrowers.

Consumer Law

Consumer law is concerned with the supply of goods or services for personal or family use or consumption.[182] The features that distinguish consumers from other actors in the marketplace are disparity of knowledge and resources, and disparity in bargaining power vis-à-vis the supplier of goods or services. The vulnerability of consumers to abuse has long been of concern, and consumers are the objects of solicitude in such early disparate sources as the Bible, the Code of Hammurabi, and the Roman law of sale.

The Canadian history of consumer law goes back to the early days of Confederation. Further legislation was adopted at the federal and provincial levels in the interwar period. The level of government intervention greatly increased in the postwar period, particularly in the 1960s and 1970s, partly because of the explosive growth of consumer credit, unethical marketplace practices, and concerns about the safety of drugs and products for domestic use, and partly because of a general questioning of marketplace morality.[183]

The legislative powers of the federal and provincial governments are much more evenly matched in the consumer area than they are in the commercial law area, and both levels of government have freely exercised their powers. As Professor Neilson describes in detail in his research paper,[184] there is also much overlap in this area between federal and provincial jurisdictions. The federal legislation covers such disparate areas as the regulation of food and drugs, weights and measures, hazardous products, meat inspection, grading of agricultural products, packaging and labelling of food products, misleading advertising, and usury. The provincial legislation has focussed on regulation of the various aspects of consumer credit, disclosure requirements, door-to-door selling and other unconscionable practices, consumer warranties, and the licensing of car dealers and other occupations. An extensive incursion into marketplace morality is represented by the business practices and trade practices acts first enacted in British Columbia and Ontario in 1974[185] and subsequently copied in part in Alberta, Quebec, Prince Edward Island, and Newfoundland.

Professor Neilson's paper describes the jurisdictional conflicts between the federal and provincial governments, and their not always successful attempts to coordinate their legislative and administrative efforts in the consumer protection area. Unfortunately, the provinces have been no more successful in harmonizing their own legislation.[186] The Uniform Law Conference has never played a role in this area and, with modest exceptions, the commonality that exists in the provincial legislation has come about largely because of the tendency of the provinces to borrow from each other's statute book. Even so there are numerous differences in detail, and sometimes of principle, among much of the legislation. The differences are particularly striking in the trade practices legislation where no two acts agree on the scope of the legislation, the types of trade practice being regulated, or the private and public law remedies available for the enforcement of the statutory norms.[187] Discrepancies of such magnitude may suggest that national suppliers of goods and services live in a bureaucratic nightmare. The correct answer unfortunately is that in many of the provinces — perhaps most — much of the postwar consumer protection legislation is not being actively enforced. Almost everywhere the consumer protection agencies are chronically short of funds and in some cases important programs have been closed down altogether. Consumers are left largely to fend for themselves.

Insurance Law

Insurance law deserves to be included in this overview, not only because of the commercial importance of insurance but because it is one of the few genuine success stories in the harmonization of provincial legislation and administration.

The insurance industry in Canada has been a closely regulated industry since before the turn of the century.[188] For almost half a century, the federal government attempted to assert control over the industry but these efforts were rebuffed by the courts on constitutional grounds.[189] Since the 1920s, it has been settled that the regulation of insurance belongs primarily to the provinces under their property and civil rights jurisdiction, although the federal government continues to regulate the solvency and investment powers of federally incorporated insurance companies. The federal Department of Insurance also encourages the registration of other insurance companies under the *Canadian and British Insurance Companies Act*[190] or the *Foreign Insurance Companies Act*.[191] However, the existence of a federal licence does not entitle a company to operate in a province without first meeting provincial requirements. The earlier constitutional battles have also been replaced by a more cooperative attitude between the two levels of government.[192] According to Brown and Menezes,[193] Nova Scotia relies on federal

supervision to secure the solvency of insurers doing business in the province. Other provinces accept compliance with the federal regulations as sufficient compliance with provincial financial requirements for companies wishing to do business in the province, or as a basis for granting exemption from the provincial controls. As the same authors note, "the results of all the litigation may be untidy from a constitutional standpoint but appear to be eminently workable and successful from the restricted perspective of insurance law."[194]

In *Parsons'*[195] case, the Privy Council upheld the power of the provinces to regulate insurance contracts, and the provinces have continued to do so ever since. A striking feature of this aspect of Canadian law is the extent to which the provinces, operating through the Association of Superintendents of Insurance, have been able to agree upon uniform statutory provisions.[196] Uniform accident and sickness provisions were adopted as early as 1921, uniform fire insurance provisions have been in use since 1925, and automobile insurance provisions were originally adopted in 1932.

An important factor in securing and maintaining this high degree of uniformity has been the role of the insurance industry itself, and in particular the role of the Insurance Bureau of Canada and the Canadian Life and Health Insurance Association (CLHIA).[197] The Insurance Bureau represents the majority of insurers in the fields of automobile and casualty and property insurance in Canada, and both associations have close working relationships with the Association of Superintendents. Apart from making legislative proposals and maintaining a high profile for the industry generally, the Bureau has also been instrumental in securing uniform practices among insurers in settling claims and standardizing forms. Another striking feature of this regulatory area is the extent to which representatives of all branches of the industry participate at the open meetings of the Association[198] — a far cry indeed from the cloistered meetings of the Uniform Law Conference!

In a paper prepared for this Royal Commission and appearing elsewhere in this volume, Marvin G. Baer attributes the successful harmonization of provincial insurance regulation and its administration to a number of factors.[199] Two of the most important are the willingness of the provinces to delegate primary responsibility to the federal government to ensure the financial soundness of the industry, and the fact that the insurance industry is highly organized with the necessary resources, energy and interest to promote the harmonization of provincial laws. As Professor Baer explains, "The major product that the industry markets is a legal contract, a feature peculiarly subject to legislative vagaries, and this gives the industry a strong incentive to promote uniformity." The industry is also assisted in its goal by the fact that in the insurance area Canada is not divided into "producing" and "consuming" provinces; the two provinces (Ontario and Quebec) that are home to the largest number of insurance companies also account for the largest number of

insured. Professor Baer also notes[200] the importance of timing as an initial determinant of the success of harmonization efforts. In his view, Canada was fortunate because the harmonization movement followed a lengthy period during which federal and provincial officials developed a common regulatory and administrative philosophy. Finally, Professor Baer stresses[201] the importance of the autonomous position of the Superintendents and the technical nature and low public visibility of insurance law. He constrasts[202] the American experience (where there is much less uniformity in state law and administration) with the Canadian experience and draws the conclusion that it is a mistake to assume that there are unique features about the insurance industry that make uniformity a necessity. As he observes,[203] "The American experience illustrates that the industry can prosper even with a significant diversity in state regulation." In my view, Professor Baer's analysis of the insurance position also goes a long way toward explaining the successes and failures of the attempt to harmonize other important branches of provincial law.

Business Corporations Law and Securities Regulation

Section 92(13) of the *Canadian Constitution Act* confers explicit power on the provinces to incorporate companies with provincial objects.[204] No similar power is conferred on the federal government to incorporate companies to carry on business interprovincially, but the Privy Council held in *Citizens' Insurance Co. of Canada v. Parsons*[205] that the authority could be derived from the peace, order and good government clause of section 91. The decision merely legitimated a federal practice that had existed since the earliest days of Confederation and confirmed that, constitutionally, Canada was endowed with ten provincial incorporation and regulatory powers and one federal power. The powers were exercised and each province now has its own corporations and securities legislation. The federal government's legislation has so far been confined to corporations law.[206]

It was not difficult to predict that in such profusion of exercised powers lay the seeds of confusion and duplication. The dangers were much enhanced because the provinces early adopted two very different methods for the general incorporation of companies.[207] British Columbia, Alberta, Saskatchewan, Nova Scotia, and Newfoundland followed the British method of incorporation by certificate of incorporation, while the other provinces and the federal government adopted the letters patent method. The differences between the two types of corporation laws went well beyond the method of incorporation, since the form of incorporation also brought in its train important conceptual differences between registration and letters patent companies.

Discussions between federal and provincial officials to resolve these

differences and to seek agreement on a uniform companies act were held as early as 1910.[208] The theme was again pursued early in the life of the Canadian Bar Association and, a few years later, by the Uniform Law Conference, but nothing came of any of these efforts.

In 1935, pursuant to a resolution of the Dominion-Provincial Conference of that year, there was established the Dominion-Provincial Committee on Uniform Company Law. The committee made little progress before the war interrupted its work. The committee was reconstituted under a new name in 1948, but did not produce its first draft of a uniform companies act until 1958. In 1960, the committee completed work on *two* drafts, one for adoption by letters patent jurisdictions and the other for adoption by registration jurisdictions. Not suprisingly, these proposals generated little enthusiasm among members of the bar and this ill-conceived approach to uniformity was abandoned shortly afterward.

There began instead a new and much more promising sequence of events.[209] In 1970 Ontario adopted an entirely new *Business Corporations Act*[210] which implemented the recommendations, made a few years earlier, of the Lawrence Committee.[211] One of the many important changes introduced by this act was the abandonment of the letters patent method of incorporation in favour of the registration method. In 1971, a federal task force published its *Proposals for a New Business Corporations Law for Canada*,[212] which endorsed many of the changes already incorporated in the Ontario act as well as proposing many new ones of its own. The federal *Proposals* were largely adopted in the *Canada Business Corporations Act* (CBCA) of 1975.[213] Since then, to a degree that could not have been anticipated, the CBCA has become the prototype for the new business corporations acts in Alberta, Saskatchewan, Manitoba, and New Brunswick and has influenced significantly legislation in Nova Scotia and Quebec.[214] In 1982, Ontario repealed its 1970 act and adopted a new *Business Corporations Act*[215] which also closely follows the federal model.

While an authoritative account of these recent events still needs to be written, they seem to show that formal machinery is not essential for the successful implementation of substantially uniform legislation. In the case of the *Business Corporations Act*, the important ingredients were timing (most of the provinces as well as the federal authorities felt the need for a modern act), an appealing product (the CBCA is simply written and sweeps away many ineffectual corporate restrictions while conferring new and improved forms of protection on minority shareholders), and successful marketing (the then federal assistant deputy minister for corporate affairs kept closely in touch with his provincial counterparts).

The history of securities regulation in Canada[216] is substantially different from the history of companies legislation and contains its own message. The aim of securities regulation is to provide an informed and honest market in the publicly issued and traded securities of corpora-

tions and other issuers. The Canadian legislation accomplishes this by a policy of full and ongoing disclosure of all relevant information and by imposing a comprehensive regime of supervision and registration of securities and their issuers and of the members of the securities industry. At the turn of the century, disclosure requirements with respect to the issue of new securities had already appeared in British companies legislation and were quickly copied in the federal and provincial legislation. In 1912, Manitoba pioneered the introduction of "blue sky" legislation in Canada whose object was to prevent the fraudulent trading of securities by vesting broad discretionary powers in a regulatory agency. In 1928, Ontario adopted a more comprehensive *Security Frauds Prevention Act* and this became in 1931 the basis of a *Uniform Security Frauds Prevention Act* which was widely adopted by the provinces.

A new era in securities regulation began in 1965 with the report of the Kimber Committee in Ontario[217] which, in addition to strengthened disclosure and reporting requirements, recommended legislation to regulate proxies and proxies solicitation, insider trading, and takeover bids. The recommendations were quickly implemented in the *Ontario Securities Act, 1966*.[218] The act in turn was substantially adopted in the four western provinces and also influenced the legislation of several of the other provinces. In 1972, Ontario unveiled a new draft act which, after considerable delay, became the *Securities Act, 1978*.[219] There appears little likelihood, however, of the act being copied by the other provinces in the foreseeable future. "Five provinces are apparently resigned to the retention of their present acts, none of the three that have enacted or proposed new legislation follows the Ontario Act without variation, and the remaining province, British Columbia, is also unlikely to do so."[220]

There is close consultation between the securities administrators of all the provinces, and they meet at regular intervals to discuss regulatory and administrative problems. One of the products of this association has been the adoption of National Policy Statements by the administrators and the adoption of Uniform Act Policies by the four western provinces and Ontario. Nevertheless, as Professor Anisman informs us,[221]

> Although the attempts at uniform legislation in the late 1960s and at uniform administration in the 1970s were laudable, they did not remove substantial differences in legislation and policy. The acts in even the so-called "uniform act provinces" vary in detail and substance, the national policies were criticized soon after their adoption and have recently been declared to be in need of revision and in any event each of these provinces retains a residue of local policies, some of which may be applicable to transactions involving more than one province.

For the past 20 years, there have been intermittent discussions about the desirability of a federal securities agency to regulate international and

interprovincial securities in Canada. A recommendation to this effect was made in the report of the Porter Commission,[222] and it was examined by a Securities Law Task Force established by the federal government in 1966. In 1967, the Ontario Securities Commission floated the possibility of a Canadian securities commission jointly sponsored by the provinces and the federal government[223] but it won little support from either level of government.

In 1973, the federal Department of Consumer and Corporate Affairs retained Philip Anisman to direct a new and comprehensive securities market study and to make concrete legislative proposals following the format of the *Proposals for a New Business Corporations Law for Canada*. The three-volume report of the task force, *Proposals for a Securities Market Law for Canada*, was published in 1979.[224] Although the quality of the *Proposals* has been highly praised by scholars, the suggestion for the injection of a federal regulatory agency into what is already a complex regulatory field has been coolly received by the industry and the financial media. The Minister of Consumer and Corporate Affairs indicated in 1982 that the federal government did not intend to seek to implement the *Proposals*.[225] The prospects of the *Proposals* being revived in the foreseeable future seem equally doubtful.

Two lessons appear to emerge from the history of securities regulation in Canada. The first is that delay is dangerous if not fatal, and that if the federal government wishes to play an important role in a regulatory area (assuming it has the constitutional competence) it must not wait 50 years to do so. The second lesson is that in regulatory matters, no less than in scientific matters, nature abhors a vaccuum. Almost from the beginning Ontario has provided the leadership which might, and probably ought to, have been provided by the federal government, and it continues to set the pace. That Ontario plays such a pivotal role is not surprising, given the economic and financial importance of the province and the fact that Canada's capital market is now largely centred in Toronto. What is perhaps surprising is that the other provinces, with the exception of Quebec, appear so ready to acquiesce in Ontario's de facto domination of the regulatory area, or at any rate appear to prefer it to a belated federal intrusion and the introduction of a new level of bureaucracy.

Comparative Aspects

This part of the paper will be concerned with the experience of two other federal states in securing legislative harmonization among its member states: the United States and Australia. The United States is a logical choice because it is our closest neighbour and most important trading partner, and because of the pervasive influence it has exercised on the development of much of Canada's postwar business law. Australia shares with Canada a common legal tradition and culture; the size of its

population (approximately 15 million) is much closer to ours than that of the United States; and both countries are in a comparable state of industrial development and occupy vast and generally sparsely settled land masses. In the space at my disposal, I cannot hope to do justice to the complex picture in the United States and Australia. I shall, therefore, content myself with some broad brush strokes to highlight the principal developments and to indicate what seem to be some of the important differences between their approaches to interstate harmonization of laws and the methods pursued in Canada.

United States

In a formal sense, the U.S. constitution is less generous than the Canadian *Constitution Act* in vesting legislative powers in the federal government and, unlike the Canadian position, the residuary powers are vested in the states and not in the central government. The real position, however, is quite different. Article I, section 8 of the American constitution empowers the federal government to regulate commerce "with foreign Nations, and among the several States." The commerce power has turned out to be the principal constitutional vehicle by means of which the U.S. federal government injected itself energetically in the 20th century into the regulation of all aspects of the economic union, and it has done so to a significantly greater extent than the federal government in Canada and, in the latter stages, with far less resistance from the courts.[226] It is commonly said that today the commerce power enables the U.S. government to regulate almost every facet of the American economy.[227] Moreover, if it wishes, Congress can pre-empt a given legislative area and exclude the states from it entirely.[228]

The 19th century picture was rather different. The potency of the commerce power was not yet established and almost all areas of private business law, including sales, banking, negotiable instruments and corporations law, were governed by state law. It was in this environment that the National Conference of Commissioners on Uniform State Laws (NCCUSL) was established in 1892,[229] The factors that led to its establishment were the same as those that accounted for the establishment of the Canadian Conference of Commissioners in 1918.

Although the NCCUSL provided the model for the later Canadian Conference, it differs from it organizationally in important respects. To begin with, the NCCUSL is a much more representative organization. Although appointed by the member states of the Conference, the state commissioners are drawn from all the major branches of the legal profession.[230] A striking fact is that practitioners constitute the single largest bloc (approximately 45 percent in 1981), whereas government officials only account for about 17 percent of the total number.[231] The remaining commissioners are made up of law professors (15 percent),

TABLE 1-2 National Conference of Commissioners on Uniform State Laws: Record of Passage of Uniform and Model Acts by Jurisdiction as of September 1983

	Number of Jurisdictions	Number of Acts Passed	Number of Acts Passed (as % of total)
	0	15	16.13
	1–13	40	43.01
	14–26	11	11.83
	27–39	12	12.90
	40–52	13	13.98
	53	2	2.15
Totals	53	93	100.00

Source: Compiled by the author from information in the Handbook of the National Conference of Commissioners on Uniform State Laws & Proceedings of the 92nd Annual Conference (1983).

state legislators (10 percent) and judges (4 percent). The NCCUSL is also much better financed than its Canadian counterpart,[232] and it has a permanent office in Chicago[233] with a full and part-time staff. It goes about its work in a more structured and consultative manner,[234] and frequently makes use of outside consultants and reporters in the drafting of uniform and model acts.[235] Proposals for new projects are more carefully screened, and draft uniform and model acts are much more critically and systematically scrutinized before they are finally approved.[236] Finally, each commissioner is obligated to endeavour to procure consideration by his state of the uniform and model acts approved by the NCCUSL, "unless the Commissioners deem the act unsuitable or impracticable for enactment in their state."[237]

The more structured organization, greater representativeness and better financing of the NCCUSL does not, however, appear to have made an appreciable difference to its levels of success compared to its Canadian counterpart. As of 1983 the NCCUSL had approved 93 uniform or model acts which were still current.[238] Only two of them (attendance of out of state witnesses; reciprocal enforcement of support) had been substantially adopted by all the member jurisdictions; four uniform or model acts have been adopted in 51 jurisdictions, and three uniform or model acts in 50 jurisdictions. Fifteen uniform or model acts had not been enacted in any jurisdiction, six had only been adopted in one jurisdiction, and six in two jurisdictions. Moreover, the tendency to adopt unauthorized amended versions appears to be as strong among the American states as it is among the Canadian provinces.

There is one important exception to the NCCUSL's generally modest level of success, and this involves the Uniform Commercial Code. A joint product of the American Law Institute and the National Conference, the Code was first promulgated in 1951 and has since been revised or amended on several occasions.[239] The Code is in force in all of the

states, with the exception of Louisiana (where it has been partially adopted), and in the District of Columbia. The near-universal adoption of the Uniform Commercial Code is indeed a magnificent achievement, but the success of this great enterprise is the result of special factors and the enormous efforts made by its sponsors to secure its acceptance by the states. It does not indicate that the NCCUSL has found the answer to a problem which has also pursued the Uniform Law Conference almost from the beginning. Rather, the overall conclusion would appear to be that structure, professionalism, finance, and good organization are not by themselves sufficient to guarantee a high level of adoption of uniform acts. Allison Dunham, a former NCCUSL official, has examined some of the causes for the Conference's uneven levels of success.[240] He attributes it to the strength of local traditions, lack of speed by the Conference in responding to problems, and lack of total commitment by commissioners to the principle of uniformity. The list sounds all too familiar to Canadian ears.

One important difference between the American and Canadian positions lies in the effectiveness of the commerce power. When the states fail to act or a problem cannot be resolved adequately at the state level, Congress often intervenes to impose a national solution. This appreciation of the congressional role has reduced the early importance of the National Conference, although many areas of private law are still primarily regulated by state law.[241] In Canada, on the other hand, there is no ready alternative to voluntary cooperation among the provinces, and the trade and commerce clause has not fulfilled its early promise.

The NCCUSL is not the only American organization working toward unification of private law among the states, and mention should be made of two other bodies. The American Law Institute, a non-governmental institution, was established in 1923 to clarify American common law principles and to provide doctrinal guidance to federal and state courts.[242] American lawyers were faced with a great outpouring of frequently conflicting case law and, unlike Canada, there is no final appellate tribunal available to impose uniform rules. The method adopted by the Institute to restore a measure of harmony is to ask leading scholars in the major branches of American law to prepare "Restatements" based on their selection of what they deem to be the best rules where there are conflicting decisions or where there are none. The draft Restatements are carefully scrutinized and debated at public meetings of the members of the institute — leading members of the profession in their own right — and they do not join the corpus of Restatements until they have been approved by the membership. The first series of Restatements were completed in the 1930s and 1940s, and a second edition is now moving toward completion.[243] The Restatements have been very influential and are frequently cited in American state court and federal court decisions.

The other harmonizing agency to which reference may usefully be

made is the Section on Corporation, Banking and Business Law of the American Bar Association. A committee of the section drafted a model Business Corporations Act in 1950, which has since been revised on several occasions.[244] As of 1979, the act had been adopted in 35 states and had influenced legislative provisions in many others.

Australia

As in Canada and the U.S., legislative powers in Australia under the *Commonwealth Act*[245] are divided between the central (Commonwealth) government and the states, but the powers of the Commonwealth government are not as extensive as those enjoyed by the federal government in Canada. Further, the residuary power rests with the states, although in case of conflict between Commonwealth and state legislation, the Commonwealth legislation prevails.[246]

The specific (but not exclusive) powers conferred on the Commonwealth government, and the powers most relevant for the purpose of regulating interstate commerce, are those found in the interstate commerce clause,[247] and in the banking, insurance and bankruptcy and insolvency clauses.[248] The Commonwealth government also enjoys the power, conferred by s. 51(xx), to make laws in relation to "foreign corporations and trading or financial corporations." The commerce and corporations powers have given rise to much litigation and considerable doubts remain as to their precise scope.[249] A further parallel with the Canadian position resides in the fact that the state governments jealousy guard their constitutional authority and strongly resist Commonwealth attempts to monopolize powers in the corporate, securities and general commercial law areas.[250]

The need to harmonize state legislation[251] was first expressed before World War II, but tangible results apparently did not materialize until 1958 when the state governments agreed to introduce uniform hire-purchase legislation.[252] In 1961, a conference of state attorneys-general and registrars of companies also hammered out agreement on a *Uniform Companies Act*, and uniform companies legislation was enacted in all the states by 1964.[253]

Australia does not have a body corresponding to the Uniform Law Conference in Canada or the NCCUSL in the United States. However, their positive experience with the uniform hire-purchase and uniform companies legislation encouraged the state and Commonwealth governments to establish a new agency in 1960, the Standing Committee of Commonwealth and State Attorneys-General,[254] to review existing uniform legislation and to consider new projects for legislative harmonization. The Standing Committee has been responsible for uniform legislation in such diverse areas as offshore petroleum rights, maintenance of children, sale of human blood, and the labelling and packaging of consumer products.

The Standing Committee has no constitutional or statutory basis, no formal structure, and no secretariat or funds of its own. Its frequent meetings are quite informal and are held in camera. No minutes are published of its proceedings and all decisions are unanimous. Draft uniform acts are not circulated for public comment and apparently are not even available to the public until the act is introduced in the state parliaments. The secrecy and excessive informality surrounding the Standing Committee's work has been criticized,[255] and equally vigorously defended.[256] From a Canadian point of view, the strength of the Australian approach to legislative harmonization lies in the fact that it involves the active participation of senior ministers of the state and Commonwealth governments, and thus ensures adoption of a uniform act once its terms have been agreed upon. Its weakness derives from the fact that the Standing Committee works very slowly and sometimes fails to reach agreement altogether. As a result important branches of commercial and consumer law remain non-uniform and there is no proper coordination of state and Commonwealth legislation where both levels of government have concurrent jurisdiction. As an Australian scholar has noted, however, the main obstacle to greater harmonization of state legislation lies not so much in the inadequacies of the existing structures as in the absence of strong political support for unification as an important goal.[257] He also ascribes much of the blame to the strong assertions of state autonomy and to distrust of centralized powers.

The extraordinary lengths to which the state governments will go to avoid centralization of powers in the Commonwealth government is illustrated by the formal agreement reached between the Commonwealth and state governments on December 28, 1978 on cooperative companies and securities industry legislation. This complex agreement comprises the following elements:[258]

Ministerial council The council is responsible for approving the Commonwealth legislation to be adopted by the states and for ongoing review of the companies and securities industry legislation.

National Companies and Securities Commission (NCSC) This body is responsible for the policy formulations and overall administration of the new companies and securities legislation. Its members are appointed by the ministerial council. The costs of the Commission are shared between the Commonwealth government and the states.

Decentralized administration Each state and territorial government continues to be responsible for its own companies and securities industry legislation subject to direction by the NCSC.

Uniform companies and securities industry legislation The Commonwealth is required to enact legislation substantially in conformity with

the *Companies Act*, the *Securities Industry Acts*, and the *Marketable Securities Acts* previously adopted by four of the states. When the Commonwealth legislation is in place each state will repeal its own acts and adopt the Commonwealth laws by an *Application of Laws Act*.

Amendment of scheme legislation Amendements may be proposed by the NCSC, the Commonwealth, or any state.

Withdrawal from agreement Any party to the agreement is free to withdraw from it on giving one year's notice to the ministerial council.

H.A.J. Ford observes that the cooperative scheme represents a compromise between those seeking uniformity of laws and their administration and those wishing to avoid centralization of power.[259] An outsider may be forgiven for wondering whether the compromise has not been bought at too high a price.

It remains to note Australias's experience with its law reform agencies.[260] During the past 20 years, the Commonwealth has experienced a great increase in the number of bodies concerned with one or more aspects of law reform at the state or federal level, and there are now 11 such agencies. Some states have more than one. As in Canada's case, the agencies vary greatly in size, funding, and structure. In Australia too there are complaints about duplication of programmes, and the problem has been discussed on several occasions by the Australian Law Reform Agencies Conference.[261] So far, however, the Australians have been no more successful in finding an acceptable formula to coordinate their activities than have the Canadian agencies.

Conclusions

The Canadian picture is a complex one. It runs the gamut from the very substantial degree of uniformity among the provincial insurance acts and the less complete but still substantial uniformity among federal and provincial business corporations acts at one end, to the limited and diminishing degree of harmonization in the consumer protection area at the other. In between we have the special situation brought about by Ontario's domination of the securities market and the uneven record of the Uniform Law Conference of Canada. This diversity should not surprise us, since it is common to other federal systems of government.

A number of other facts may be gleaned from the Canadian experience. One is that uniformity of provincial legislation is no greater in the commercial law area than it is in most other areas. In fact, in the corporate law sphere it remained strikingly disparate until the enactment

of the *Canada Business Corporations Act* in 1975 and its adoption, in whole or in part, in many of the other provinces. In other areas of commercial and corporate law (for example, sales law or partnership law) such uniformity as exists is the result more of the British legacy than of any organized effort among the provinces. Another fact that emerges is that a high degree of legislative uniformity has been achieved, with surprisingly little effort, in such low profile non-commercial areas as enforcement of foreign judgments and contributory negligence. In yet other areas, such as insurance, uniformity has only come about, and remains substantially so, as the result of strenuous and effective lobbying by relevant interest groups.

All this suggests that the elaboration of an acceptable theory of uniformity in the Canadian context is a challenging task. For the purposes of this paper, it may be sufficient to address ourselves to three questions: What is the price of disparate provincial legislation? What are the ingredients of successful harmonization of provincial laws? How can the present position be improved?

The Price of Non-Uniformity

There are surprisingly little hard data about the costs of provincial diversity. That it must increase the cost of doing business at all levels can easily be shown. What is not known is how these costs compare with the other costs, how readily they can be passed on to consumers, and to what extent they reduce overall national efficiency and Canada's ability to compete internationally.[262] The compilation of such figures might help us understand why uniformity of provincial legislation is much more pronounced in some areas than in others and why, on the whole, the business and legal communities give low priority to the securing of legislative uniformity.

It would be tempting to argue that any diversity in provincial legislation is objectionable if it cannot be justified on persuasive social, cultural, or economic grounds. To adopt this purist position ignores, however, the legal and political reality that constitutionally the provinces are entitled to be different. The challenge lies in persuading the provinces that the benefits to them from the adoption of uniform laws greatly exceed any apparent loss of provincial autonomy, and this is a burden not always easy to discharge.

Although the measurement of economic costs is an important exercise in helping us to design better and more efficient strategies for unifying provincial laws, it must be appreciated that lack of uniformity may also entail important social and psychological costs. To strengthen the Canadian national identity and sense of a common cultural community may be as important as lowering the economic barriers to the free flow of goods, capital, labour and services.

The Ingredients of Successful Harmonization

One of the lessons that may safely be drawn from this survey of Canadian experience and techniques to harmonize provincial legislation is that there is no single successful ingredient. Another is that the existence of large formal structures such as the Uniform Law Conference is no guarantee of success. Insofar as one may generalize from the experience of Canada, Australia and the United States, three ingredients may be more important than others for successful harmonization of provincial or state laws. The first is a visible and powerful lobby to press for uniformity. This is proved in the insurance and, to a lesser extent, the securities area.

The second ingredient is accountability to a clearly identifiable constituency. This again is shown by the insurance experience. Its negative side is illustrated by the record of the Uniform Law Conference and the low level of uniformity in the consumer protection area. The Uniform Law Conference is not accountable to any single constituency; at best it caters to a wide range of shifting and diffused social and economic interests. Consequently, the Conference has felt little pressure to streamline its operations, to lobby vigorously for the enactment of its uniform acts, and to resist non-uniform amendments to uniform acts. Consumer protection officials are in much the same position, since consumers are notoriously weakly organized and carry little political clout.

The third ingredient for successful harmonization is proximity to the governmental decision-making process. This lesson is strikingly taught by the Australian Standing Committee of Commonwealth and State Attorneys-General and will, one hopes, also be applied in Canada. Clearly, an annual meeting of senior provincial ministers specifically earmarked to reach consensus on uniform legislation should be able to accomplish what a Uniform Law Conference may not be able to accomplish over a period of many more years. This does not mean, it should be emphasized, that the Uniform Law Conference should be abandoned; what it does suggest is a marriage of effort between the Conference and meetings of the provincial attorneys-general and other senior officials comparable to the deliberations of the Australian Standing Committee.

I appreciate that the provincial attorneys-general already meet at regular intervals and that there is nothing to prevent them from adding the implementation of uniform legislation to their agendas. However, my understanding is that they do not usually concern themselves with private law legislative problems[263] and that much of their discussions focus on problems in the administration of criminal justice. The fact that they are so little involved in the work of the Uniform Law Conference speaks eloquently about the low priority which provincial governments assign to uniform legislation. This does not prove, in my view, that the

attorneys-general should not be involved; what it does show is that the political will to elevate interprovincial harmonization of law to a higher status must precede inclusion of the item in the agendas of the attorneys-general.

Recommendations

In the light of the foregoing discussion I would offer the following recommendations:

1. Uniform Law Conference

Better representation of the different branches of the legal professions, a strengthened secretariat, better in-house research capabilities, the establishment of standing committees, the regular use of outside consultants, and extensive consultations with outside constituencies before a uniform act is adopted, are among the more important reforms that should be adopted if the Uniform Law Conference is to discharge its important mandate more effectively.

2. Establishment of standing committee of provincial attorneys-general

The Australian experience has proved the value of a standing committee of provincial attorneys-general. It is unrealistic to expect individual commissioners of the Uniform Law Conference to carry the burden of selling uniform legislation in their respective jurisdictions. A standing committee of provincial and federal attorneys-general would be a much more appropriate body, and would have much better prospects of success.

3. Law reform agencies

There is no persuasive reason why the federal and provincial agencies should continue to duplicate each other's programmes. I would urge the establishment of a federal-provincial coordinating law reform agency which would act as a clearing house for new programmes and be authorized to sponsor research projects of common interest and national importance.

4. Special uniformity projects

Uniformity in some areas may be of such overriding importance that special efforts may be necessary for its implementation. These areas would include revised sale of goods and personal property security legislation, securities regulation, and a consumer credit code. The Uni-

form Law Conference and the recommended standing committee of attorneys-general should be encouraged to sponsor such special projects and to enlist the aid of the Canadian Bar Association and such industry and consumer groups as may be appropriate.

5. Unifying role of the Supreme Court of Canada

I proceed from the premise that the Supreme Court should continue to discharge its historical mandate in maintaining doctrinal uniformity among the common law provinces. Abdication by the Court of this unifying function is likely to lead to a growing disintegration of the substantial doctrinal uniformity that has hitherto existed among the common law provinces since none of the provincial appellate courts is bound by the decision of any other. There is already substantial evidence of disagreement between appellate courts on important doctrinal issues.[264] While such diversity may be jurisprudentially and intellectually enriching, it is also bound to lead to much uncertainty.

It is generally agreed that the Supreme Court is playing a diminishing role in the hearing of private law appeals, and that this trend is likely to persist in the face of the greatly increased number of public law and charter cases for which leave to appeal is being given. As previously indicated,[265] there are also widespread misgivings about the quality of some of the Supreme Court judgments in the private law area. This seems to point to the desirability of the Supreme Court being able to do more than to carve out more blocks of time for the hearing of private law appeals; the Court must also be able to address the issues raised by the appeals as searchingly and with the same comprehensiveness as it brings to bear on public law questions.

Three alternative solutions suggest themselves to these problems. The first is to enlarge the size of the Court so as to enable it to entertain a larger number of private law appeals without having to reduce its other case load. The addition of four extra judges, for example, would enable the Court, if it wished, to sit concurrently in two divisions of five judges each, or for a chamber of five judges to sit substantially continuously during the legal year in cases not requiring the participation of all judges. The second solution would be the establishment of an interprovincial court of appeal that would be concerned exclusively with questions of provincial law and thus relieve the Supreme Court of much of the burden of appeals in private law cases.[266] As one possibility, the members of this tribunal could be nominated by the provincial governments from among the members of existing provincial appeal courts. The establishment of such a court might require a constitutional amendment. The third alternative would involve no legislative or structural changes. It would, however, require the Supreme Court to be much more rigorous in granting leave to appeal in public law cases, including charter cases, so as to open up adequate blocks of time for the hearing of private law appeals.

On balance, the third solution is likely to commend itself as the most attractive and the easiest to implement. This is particularly so in light of the substantial evidence that the Court has been too generous in the past in granting leave to appeal in public law cases.[267] The first solution (the appointment of more Supreme Court judges)[268] is likely to encounter objections on the ground that it would interfere with the collegiality of its members and also increase substantially the bureaucratization of the Court's work.[269] It probably would also be argued that a larger Court would not be able necessarily to handle more cases so long as (as seems likely) all constitutional cases continue to be heard by the full Court.[270]

The second solution (the establishment of an interprovincial court of appeal) could be expected to be opposed on two grounds. The first would be its constitutional novelty. Further, since the Supreme Court's own constitutional position is widely regarded as anomalous[271] the federal and provincial governments are unlikely to be interested in considering new appellate structures until the existing anomaly has been resolved. The second and, in my view, more persuasive objection is that the creation of an interprovincial appellate tribunal would lead to untenable distinctions between questions of provincial and federal law and between constitutional and non-constitutional issues. Since the same case frequently raises a range of issues, appellate compartmentalization would lead to all the difficulties (so it will be argued) long familiar to civil law jurisdictions with different types of final appellate tribunals.[272]

The third solution appears to be the most attractive. However, it must not be regarded as an affirmation of the status quo. It will only be a genuine alternative if the Supreme Court can be persuaded to adopt, and to abide by, meaningful criteria for granting leave to appeal and to rescue private law appeals from their neglected status.

6. The Role of the Law Schools and of Legal Scholarship

Provincial uniformity is as much a state of mind as an economic objective. As the principal centres of legal education, the law schools in the common law jurisdictions can strengthen the interprovincial ties considerably by emphasizing the unity of the legal heritage of the common law provinces and by designing curricula around the broad goals and general principles of the major branches of private and public law.[273] Continuing and indeed enhanced mobility of law students and law teachers among the schools are important adjuncts to these goals and deserve to be supported financially as well as culturally.

The promotion of Canadian legal scholarship in every branch of law should be placed on at least as high a plane. Canada now possesses a substantial number of high-quality, mainly law school sponsored, law reviews. As has been noted,[274] during the past 20 years great strides have been made in the publication of textbooks, treatises, specialized

monographs, and research reports sponsored by the law reform agencies. These have undoubtedly helped to develop a Canadian cultural legal identity and made that much more respectable the search for common solutions to common problems. However, much remains to be done. Many branches of Canadian law are still without significant treatises. We have no Canadian Halsbury or Canadian Restatement of the Law, and our reliance on British judicial precedents is excessive. Legal scholarship is not highly regarded by many practitioners or judges, and the legal universe for many members of the legal profession is still circumscribed by provincial boundaries. The movement for interprovincial uniformity of laws cannot thrive in such a restrictive intellectual environment.

Quebec

It would be naive to pretend that Quebec's perception of itself as constituting a distinctive cultural and legal community within Canada has not weakened the pursuit of interprovincial uniformity of laws. It could hardly be otherwise, given Quebec's large population, strategic geographical position, and influential legal profession. Quebec's reluctuance for many years to seek full-fledged membership in the Uniform Law Conference merely reflected these differences. I have already suggested that the differences are neither inevitable nor always self-evident, and that there is much scope for fruitful legal cooperation between the common law provinces and Quebec, both within and outside of the Uniform Law Conference. However, there is room for improvement. Too often the duality and distinctiveness of the common law and civil law legal systems are stressed, rather than the features that unite them. Most important legal problems are surely the same whether they arise east or west of the Ottawa River.

An obvious avenue of approach would be to strengthen reciprocal knowledge and understanding of the two legal systems. A valuable beginning has been made through the bisystemic law programs at McGill and the University of Ottawa, and through the summer student law programs sponsored by the federal government and the Canadian Association of Law Teachers. The Canadian Bar Association and other legal fraternities also provide valuable *fora* for the exchange of views and experiences between Quebec and common law practitioners. Much remains to be done however to avoid unnecessary legal barriers and to facilitate greater legal mobility between Quebec and the common law provinces.

The Federal Role

Since this paper began with a discussion of the distribution of powers between federal and provincial governments under the *Constitution*

Act,[275] it seems appropriate to end on the same note. It must be evident that even under the most favourable circumstances the achievement of interprovincial uniformity of law in the commercial, consumer, corporate and securities regulation areas is a painfully slow, time-consuming, expensive, and uncertain process. Even when uniformity has been reached in a given field, the prospects are that it will soon be broken by non-uniform amendments and the search for unification must begin all over again — assuming the sponsors of the original measure can still muster the energy and have sufficient incentives to do so.

If one could be certain that all the important legislative and jurisdictional needs of the Canadian economic union were met by other means, the shortcomings of the provincial efforts would not matter greatly. Harmonization of provincial law would still be desirable but its successes or failures would not be of critical importance. These assumptions, however, cannot be made safely. It must be obvious, for example, that the federal government's lack of plenary power to enter into international treaties binding on the provinces in such areas as sale of goods, protection of foreign investments, recognition and enforcement of foreign arbitral awards or, at the purely domestic level, its lack of jurisdiction over all financial intermediaries, severely inhibits its ability to pursue national economic goals and an effective international trade policy.

If this analysis is correct, then it seems to point to the need for a revitalized interpretation by the courts of the federal trade and commerce power.[276] Fortunately, there are some hopeful signs,[277] tentative though they may still be, that members of the Supreme Court also appreciate this. A rejuvenated Section 91(2) would have two beneficial effects. First, it would enable the federal government to deal effectively with regulatory economic issues that require a national solution without waiting for federal-provincial or interprovincial agreement.[278] Second, it would give the Uniform Law Conference and other interprovincial agencies a powerful incentive to take their mandates more seriously. As long as the provinces deem themselves autonomous, even in areas obviously of great commercial import, there is no necessity for them to cooperate. The threat of federal intervention would supply the missing link. It would also generate a range of options to deal with specific issues, whether by federal or provincial means or a combination of both, that often is not available at the moment.

Appendix A

Uniform Law Conference of Canada, 1983 Proceedings

Uniform Acts Now Recommended Showing the Jurisdictions That Have Enacted Them in Whole or in Part, With or Without Modifications, or in Which Provisions Similar in Effect are in Force

Name of Act	History	Total
Accumulations Act	Enacted by N.B. *sub nom.* Property Act; Ont. (1966).	2
Bills of Sale Act	Enacted by Alta[d] (1929); (1929, 1957); N.B.[c]; Nfld.[b] (1955); N.W.T.[b] (1948); N.S. (1930); P.E.I.[c] (1933); Yukon[b] (1956).	7
Bulk Sales Act	Enacted by Alta. (1922); Man. (1921, 1951); N.B. (1927, 1982); Nfld[b] (1955); N.W.T.[d] (1948); N.S.[c], P.E.I. (1933); Yukon[b] (1956).	8
Child Abduction (Hague Convention) Act	Enacted by B.C.[b] (1982); Man. (1982); N.B.[c] (1982); N.S. (1982); Yukon (1981).	5
Condominium Insurance Act	Enacted by B.C. (1974) *sub nom.* Strata Titles Act; Man. (1976); P.E.I. (1974); Yukon (1981).	4
Conflict of Laws (Traffic Accidents) Act	Enacted by Yukon (1972).	1
Contributory Negligence Act	Enacted by Alta.[d] (1937); N.B. (1925, 1962); Nfld[b] (1951); N.W.T.[b] (1950); N.S. (1926, 1954); P.E.I.[b] (1938); Sask. (1944); Yukon (1955).	8
Criminal Injuries Compensation Act	Enacted by Alta.[d] (1969, 1982); B.C. (1972); N.W.T. (1973); Ont. (1971); Yukon[b] (1972, 1981).	5
Custody Jurisdiction and Enforcement Act	Enacted by Man.[a] (1983).	1
Defamation Act	Enacted by Alta.[d] (1947); B.C.[c] *sub nom.* Libel and Slander Act; Man. (1946); N.B.[b] (1952); N.W.T.[b] (1949); N.S. (1960); P.E.I.[b] (1948); Yukon (1954).	8

Name of Act	History	Total
Dependants' Relief Act	Enacted by N.W.T.[a] (1974); Ont. (1977) *sub nom.* Succession Law Reform Act, 1977; Part V; P.E.I. (1974) *sub nom.* Dependants of a Deceased Person Relief Act; Yukon (1981).	5
Devolution of Real Property Act	Enacted by Alta. (1928); N.B.[a] (1934); N.W.T.[b] (1954); P.E.I.[a] (1939) *sub nom.* Probate Act: Part V; Sask. (1928); Yukon (1954).	4
Domicile Act		0
Effect of Adoption Act	P.E.I. (19–).[e]	1
Evidence Act	Enacted by Man.[a] (1960); N.W.T.[b] (1948); P.E.I.[a] (1939); Ont. (1960); Yukon[b] (1955).	5
Extra-Provincial Custody Orders Enforcement Act	Enacted by Alta. (1977); B.C. (1976); Man.[b] (1982); Nfld. (1976); N.W.T. (1981); N.S. (1976); Ont. (1982); P.E.I. (1976); Sask.[b] (1977).	9
Fatal Accidents Act	Enacted by N.B. (1968); N.W.T. (1948); Ont. (1977) *sub nom.* Family Law Reform Act: Part V; P.E.I.[b] (1977); Yukon (1981).	5
Foreign Judgments Act	Enacted by N.B.[b] (1950); Sask. (1934).	2
Frustrated Contracts Act	Enacted by Alta.[d] (1949); B.C. (1974); Man. (1949); N.B. (1949); Nfld (1956); N.W.T.[d] (1956); Ont. (1949); P.E.I. (1949); Yukon (1981).	9
Highway Traffic and Vehicles Act	Part III: Responsibility of Owner and Driver for Accidents	0
Hotelkeepers Act	Enacted by Nfld.[b] (1982).	1
Human Tissue Gift Act	Enacted by Alta. (1973); B.C. (1972); Nfld.[b] (1971); N.W.T. (1966); N.S. (1973); Ont. (1971); P.E.I. (1974, 1981); Sask.[b] (1968); Yukon (1981).	9
Information Report Act		0
Interpretation Act	Enacted by Alta.[b] (1981); B.C.[b] (1974); Man. (1939, 1957); Nfld.[b] (1951); N.W.T.[b] (1948); P.E.I.[b] (1981); Que.[c], Sask.[b] (1943); Yukon[a] (1954).	9

Name of Act	History	Total
Interprovincial Subpoenas Act	Enacted by Alta.[a] (1981); B.C. (1976); Man (1975); N.B.[b] (1979); Nfld.[b] (1976); N.W.T.[b] (1976); Ont.(1979); Sask.[b] (1977); Yukon (1981).	9
Intestate Succession Act	Enacted by Alta. (1928); B.C. (1925); Man.[b] (1927, 1977) *sub nom.* Devolution of Estates Act; N.B. (1926); Nfld. (1951); N.W.T. (1948); Ont.[b] (1977) *sub nom.* Succession Law Reform Act: Part II; Sask. (1928); Yukon[b] (1954).	10
Jurors Act (Qualifications and Exemptions)	Enacted by B.C. (1977); *sub nom.* Jury Act; Nfld. (1981); P.E.I.[b] (1981).	3
Legitimacy Act	Enacted by Alta. (1928, 1960); B.C. (1922, 1960); Man. (1920, 1962); Nfld.[c], N.W.T.[b] (1949, 1964); N.S.[c]; Ont. (1921, 1962); P.E.I.[a] (1920) *sub nom.* Children's Act: Part I; Sask.[b] (1920, 1961); Yukon[a] (1954).	11
Limitation of Actions Act	Enacted by Alta. (1935); Man.[b] (1932, 1946); N.W.T.[a] (1948); P.E.I.[a] (1939); Sask. (1932); Yukon (1954).	6
Married Women's Property Act	Enacted by Man. (1945); N.B. (1951); N.W.T. (1952); Yukon[a] (1954).	4
Medical Consent of Minors Act	Enacted by N.B. (1976).	1
Occupiers' Liability Act	Enacted by B.C. (1974).	1
Partnerships Registration Act	Enacted by N.B.[c]; P.E.I.[c]; Sask.[a] (1941).	3
Pensions Trusts and Plans	Perpetuities — Enacted by B.C. (1957); Man. (1959); N.B. (1955); Nfld. (1955); N.S. (1959); Ont. (1954); Sask. (1957); Yukon (1981).	8
Perpetuities Act	Enacted by Alta. (1972); B.C. (1975); N.W.T.[a] (1968); Ont. (1966); Yukon (1968).	5
Personal Property Security Act	Enacted by Man. (1977); Ont.[b] (1967); Sask.[b] (1979); Yukon[b] (1981).	4
Powers of Attorney Act	Enacted by B.C.[a] (1979); Man.[b] (1979); Ont.[b] (1979); Sask. (1983).	4

Name of Act	History	Total
Presumption of Death Act	Enacted by B.C. (1958, 1977) *sub nom.* Survivorship and Presumption of Death Act; Man. (1968); N.W.T. (1962, 1977); N.S. (1963, 1977); Yukon (1981).	5
Proceedings Against the Crown Act	Enacted by Alta.[b] (1959); Man. (1951); N.B.[a] (1952); Nfld[b] (1973); N.S. (1951); Ont.[b] (1963); P.E.I.[a] (1973); Sask.[b] (1952).	8
Reciprocal Enforcement of Judgments Act	Enacted by Alta. (1925, 1958); B.C. (1925, 1959); Man. (1950, 1961); N.B. (1925); Nfld.[b] (1960); N.W.T.[a] (1955); N.S. (1973); Ont. (1929); P.E.I.[b] (1974); Sask. (1940); Yukon (1956, 1981).	11
Reciprocal Enforcement of Maintenance Orders Act	Enacted by Alta. (1947, 1958, 1979, 1981); B.C.[b] (1972); Man. (1946, 1961, 1983); N.B. (1951, 1981); Nfld.[a] (1951, 1961); N.W.T.[b] (1951); N.S.[a] (1949, 1983); Ont.[b] (1948, 1959); P.E.I.[b] (1951, 1983); Que. (1952); Sask. (1968, 1981, 1983); Yukon[b] (1981).	10
Regulations Act	Enacted by Alta.[b] (1957); B.C. (1983); Can.[b] (1950); Man.[b] (1945); N.B. (1962), Nfld. (1956); N.W.T.[b] (1973); Ont.[b] (1944); Sask.[b] (1963, 1982); Yukon[b] (1968).	10
Retirement Plan Beneficiaries Act	Enacted by Man. (1976); N.B. (1982); Ont. (1977 *sub nom.* Law Succession Reform Act: Part V); P.E.I.[c]; Yukon (1981).	5
Service of Process by Mail Act	Enacted by Alta.[c]; B.C.[b] (1945); Man.[c]; Sask.[c]	4
Statutes Act	Enacted by B.C.[c]; (1974); P.E.I.[c].	2
Survival of Actions Act	Enacted by B.C.[c] *sub nom.* Administrations Act; N.B. (1968); P.E.I.[c]; Yukon (1981).	4
Survivorship Act	Enacted by Alta. (1948, 1964); B.C. (1939, 1958); Man. (1942, 1962); N.B. (1940); Nfld. (1951); N.W.T. (1962); N.S. (1941); Ont. (1940); P.E.I. (1940); Sask. (1942, 1962); Yukon (1981).	11
Testamentary Additions to Trusts Act	Enacted by Yukon (1965) *sub nom.* Wills Act, s. 25	1

Name of Act	History	Total
Testators Family Maintenance Act	Enacted by 6 jurisdictions before it was superseded by the Dependants Relief Act.	
Trustee Investments Act	Enacted by B.C.[a] (1959); Man.[b] (1965); N.B. (1970); N.W.T. (1964); N.S. (1957); Sask. (1965); Yukon (1962, 1981)	7
Variation of Trusts Act	Enacted by Alta. (1964); B.C. (1968); Man. (1964); N.W.T. (1963); N.S. (1962); Ont. (1959); P.E.I. (1963); Sask. (1969).	8
Vital Statistics Act	Enacted by Alta.[b] (1959); B.C.[b] (1962); Man.[b] (1951); N.B.[b] (1979, 1983); N.W.T.[b] (1952); N.S.[b] (1952); Ont. (1948); P.E.I.[a] (1950); Sask. (1950); Yukon[b] (1954).	10
Warehousemen's Lien Act	Enacted by Alta. (1922); B.C. (1922); Man (1923); N.B. (1923); N.W.T.[b] (1948); N.S. (1951); Ont. (1924); P.E.I.[b] (1938); Sask. (1921); Yukon (1954).	10
Warehouse Receipts Act	Enacted by Alta. (1949); B.C.[b] (1945); Man.[b] (1946); N.B. (1947); N.S. (1951); Ont.[b] (1946).	6
Wills Act	Enacted by Alta.[b] (1960); B.C. (1960); Man.[b] (1964); N.B. (1959); N.W.T.[b] (1952); Sask. (1931); Yukon[b] (1954).	7
— Conflict of Laws	Enacted by B.C. (1960): Man. (1955); Nfld. (1955); Ont. (1954).	4
— (Part 4) International	Enacted by Alta. (1976); Man. (1975); Nfld. (1976); Sask. (1981).	4
— Section 17	Enacted by B.C.[b] (1979).	1

Source: Uniform Law Conference of Canada, Proceedings of 65th Annual Meeting, August 1983.

a. indicates that the Act has been enacted in part.
b. indicates that the Act has been enacted with modifications.
c. indicates that provisions similar in effect are in force.
d. indicates that the Act has since been revised by the Conference.
e. the original Table gives no date.

Appendix B

Uniform Law Conference of Canada Degree of Support for Uniform Acts as of 1983: In Decreasing Order of Number of Adoptions

Number of Adopting Jurisdictions[a]	Name of Act
12	Reciprocal Enforcement of Maintenance Orders
11	Survivorship Reciprocal Enforcement of Judgements Legitimacy
10	Intestate Succession Vital Statistics Warehousemen's Lien Regulations
9	Interprovincial Subpoenas Interpretation Human Tissue Gift Frustrated Contracts Extra-Provincial Custody Orders Enforcement
8	Bulk Sales Contributory Negligence Defamation Pensions Trusts and Plans — Perpetuities Proceedings against the Crown Variation of Trusts
7	Bills of Sale Trustee Investments Wills
6	Warehouse Receipts Limitation of Actions Devolution of Real Property

Number of Adopting Jurisdictions[a]	Name of Act
5	Child Abduction (Hague Convention)
	Evidence
	Perpetuities
	Presumption of Death
	Retirement Plan Beneficiaries
	Fatal Accidents
	Criminal Injuries
4	Compensation
	Wills (Part 4) International
	Survival of Actions
	Service of Process by Mail
	Personal Property Security
	Dependants' Relief
	Wills (Conflict of Laws)
	Condominium Insurance
	Married Women's Property
3	Partnerships Registration
	Powers of Attorney
	Jurors (Qualifications and Exemptions)
2	Statutes
	Foreign Judgments
	Accumulations
1	Conflict of Laws (Traffic Accidents)
	Effect of Adoption
	Medical Consent of Minors
	Occupiers' Liability
	Wills (Section 17)
	Hotelkeepers
	Custody Jurisdiction and Enforcement
0	Highway Traffic and Vehicles, Part III
	Domicile

Source: This Appendix has been compiled by the author from the information appearing in Appendix A.

a. With or without changes and amendments

Appendix C

National Conference of Commissioners on Uniform State Laws

Degree of Support for Uniform and Model Acts as of 1983 in Decreasing Order of Number of Adoptions

Number of Adopting Jurisdictions[a]	Name of Act
53	Attendance of out-of-state Witnesses Reciprocal Enforcement of Support
51	Commercial Code Anatomical Gift Gifts to Minors Limited Partnership
50	Child Custody Jurisdiction Criminal Extradition Partnership
49	Simultaneous Death
46	Controlled Substances
44	Testamentary Additions to Trusts Declaratory Judgments
42	Commercial Code Article 9
40	Federal Tax Lien Registration
39	Simplification of Fiduciary Security Transfers
38	Photographic Copies as Evidence
37	Principal and Income Arbitration
36	Division of Income for Tax Purposes

Number of Adopting Jurisdictions[a]	Name of Act
35	Securities Durable Power of Attorney Common Trust Fund
32	Disposition of Unclaimed Property
29	Management of Institutional Funds
27	Acknowledgement Enforcement of Foreign Judgments
26	Fiduciaries Fraudulent Conveyance
22	Alcoholism and Intoxication Treatment Facsimile Signatures of Public Officials
19	Interstate Compromise of Death Taxes Recognition of Acknowledgements Determination of Death
17	Residential Landlord and Tenant
16	Interstate Arbitration of Death Taxes Certification of Questions of Law
14	Probate Code
13	Parentage
12	Foreign Money Judgments Recognition Post-conviction Procedure
11	Trustees' Powers Deceptive Trade Practices Mandatory Disposition of Detainers Consumer Credit Code
10	Rules of Evidence
9	Condominium Commercial Code Article 8

Number of Adopting Jurisdictions[a]	Name of Act
	Crime Victims Reparations
	Disposition of Community Property Rights at Death
	Trade Secrets
	Rendition of Accused Persons
8	Duties to Disabled Persons
	Federal Lien Registration
	Jury Selection and Service
7	Disclaimer of Property Interests
	Marriage and Divorce
	Unclaimed Property
6	Adoption
5	Disclaimer of Transfers by Will, Intestacy of Appointment
	Civil Liability for Support
4	Supervision of Trustees for Charitable Purposes
	Disclaimer of Transfers under Nontestamentary Instruments
	Conservation Easement
	Consumer Sales Practices
3	Status of Convicted Persons
2	State Antitrust
	Public Assembly
	International Wills
	Juvenile Court
	Audio-visual Deposition
	Class Actions
1	Common Interest Ownership
	Comparative Fault
	Conflict of Laws — Limitations
	Exemptions
	Notarial Acts
	Transboundary Pollution Reciprocal Access

Number of Adopting Jurisdictions[a]	Name of Act
0	Transfers to Minors
	Succession without Administration
	Simplification of Land Transfers
	Premarital Agreements
	Planned Community
	Guardianship and Protective Proceedings
	Information Practices Code
	Land Transactions
	Marital Property
	Metric System Procedure
	Motor Vehicle Accident Reparations
	Extradition and Rendition
	Drug Dependence Treatment and Rehabilitation
	Rules of Criminal Procedure
	Eminent Domain Code

Source: Proceedings of the 92nd Annual Conference of the National Conference of Commissioners on Uniform State Laws, Chicago, 1983.

a. With or without changes and amendments.

Notes

This paper was completed in January 1985.

I am most grateful to Arthur Close, W.H. Hurlburt Q.C., and H. Allan Leal Q.C., for giving me the great benefit of their comments on draft versions of this paper, and for sparing me the embarrassment of some significant errors about the work of the Uniform Law Conference of Canada and other aspects of this study. Other errors no doubt remain and for these, as well as the views expressed in this paper, I alone must assume responsibility. Martin Felsky, Ph.D., LL.B., a former student of mine and now a member of the Ontario Bar, greatly assisted me in compiling several of the tables that appear in the paper. Nitya Duclos, a University of Toronto law student assumed the burdensome task of checking the footnotes. To both of them I gladly acknowledge my indebtedness.

1. Formerly known as the *British North America Act, 1867*. See the *Canada Act, 1982* (U.K.), s. 1, enacting the *Constitution Act, 1982*, Sched. B to the Act.
2. *Cf.* D.G. Creighton, *British North America At Confederation*, study prepared for the Royal Commission on Dominion-Provincial Relations (Ottawa, 1939), Append. 2, Section VIII ("The Economic Objectives of Confederation"), p. 40:

   > The Central economic ambition of the Fathers of Confederation was to increase the production, to hasten the expansion and to promote the prosperity of the British North American provinces by the establishment of a new national economy. The other economic hopes of Confederation were, in the main, included within or dependent upon this major expectation; the other economic decisions taken at Confederation were meant, on the whole, to serve this major purpose. The creation of a national economy was the economic counterpart of the establishment of a new political nationality. In both designs there was the same element of grandeur; both equally were novelties in the history of British North America; and both, it could be argued, were made necessary by the exacting conditions of the time. Thus, in the minds of its authors, the creation of the new national economy occupied a place of central importance. It was an enterprise which was consciously adopted and deliberately put into execution.

   See also Garth Stevenson, *Unfulfilled Union* (rev. ed. 1982), esp. chap. 2.
3. *Constitution Act*, s. 92(13).
4. *Ibid.*, s. 92(16).
5. *Ibid.*, s. 91(2).
6. *Ibid.*, s. 91(10).
7. *Ibid.*, s. 91(15).
8. *Ibid.*, s. 91(16).
9. *Ibid.*, s. 91(17).
10. *Ibid.*, s. 91(18).
11. *Ibid.*, s. 91(19).
12. *Ibid.*, s. 91(21).
13. *Ibid.*, s. 91(22), (23).
14. *Ibid.*, s. 91(27).
15. *Ibid.*, s. 92(10)(a).
16. *Ibid.*, s. 92(10)(c).
17. The post-1867 history of section 94 is considered in the subsection of the introduction "Section 94 of the Constitution Act."
18. See Peter W. Hogg, *Constitutional Law of Canada* (1977), chap. 15, p. 267 et seq. and *cf.* Alexander Smith, *The Commerce Power in Canada and the United States* (1963).
19. Hogg, *supra*, n. 18, chap. 14, p. 241 et seq.
20. As evidenced by such cases as *MacDonald v. Vapor Canada* (1976), 66 D.L.R. (3d) 1, S.C.C., and more recently, *CN Transportation Ltd. v. A.-G. Canada*, [1983] 2 S.C.R. 206, (1983), 49 N.R. 241, S.C.C. It is difficult, however, to accept Professor Hogg's optimistic view that since the abolition of the appeals to the Privy Council there has been "a resurgence of the trade and commerce power." Hogg, *supra*, n. 18, p. 271.

21. *Cf.* Hogg, *supra*, n. 18, p. 109: ". . . one must conclude that the cumulative effect of the recent decisions appears to be that the sole test of inconsistency in Canadian constitutional law is express contradiction."
22. Gerald Gunther, *Cases and Materials on Constitutional Law* (10th ed. 1980), p. 344.
23. *Cf.* Stevenson, *supra*, n. 2, chaps. 3–4.
24. See *infra*, subsection "A Functional Overview" in the section "The Current Canadian Position."
25. See *infra*, the section "Comparative Aspects."
26. René David, "The International Unification of Private Law," in *International Encyclopedia of Comparative Law*, (1972), vol. 2, chap. 5.
27. *Report of the Committee on Uniform State Laws of the American Bar Association, 1891*, reprinted in State Boards of Commissioners for Promoting Uniformity of Legislation in the United States, *Report of Ninth National Conference* (1899), p. 21.
28. Sir James Aikins, presidential address, *Proc. 2nd Ann. Meeting*, Canadian Bar Assoc. (1916), p. 81.
29. Address by Sir Owen Dixon, quoted in Goldring, "Unification of Laws in Australia — the Great Pipe-Dream," [1977] 1 *Unif. L. Rev.* 82, 105.
30. The Hon. Michael Hodgman (Tasmania) in discussion following paper by the Hon. N.H. Bowen, "The Work of the Standing Committee of Attorneys-General" (1971), 45 *A.L.J.* 489, 499.
31. See *infra*, "Conclusion."
32. See Professor W.A.W. Neilson, "Interjurisdictional Harmonization of Consumer Protection Laws and Administration in Canada," in *Perspectives on the Harmonization of Law in Canada*, volume 55 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (1985).
33. J.G. Castel, "Canada and the Hague Conference on Private International Law: 1893–1967" (1967), 45 *Can. Bar Rev.* 1.
34. See *infra*, subsection "Critique of the Works of the Uniform Law Conference" and Appendix A in the section "The Current Canadian Position."
35. See the detailed compilation of such laws and practices in M.J. Trebilcock, J.R.S. Prichard, T.J. Courchene, and J. Whalley, eds., *Federalism and the Canadian Economic Union*, Ontario Economic Council Research Studies (1983), chap. 11.
36. See *Companies Act*, R.S.Q. 1977, c. C-38, as am. Stat. Que. 1980, c. 28; *Securities Act*, Stat. Que. 1982, c. 48; Act respecting the class action (*Loi sur le recours collectif*), R.S.Q. 1977, c. R-2.1, as am. Stat. Que. 1982, c. 37.
37. As to which, see inter alia J.R. Silkenat, "Efforts towards Harmonization of Business Laws within the European Economic Community" (1978), 12 *Int. Law* 835; E. Stein, "Assimilation of National Laws as a Function of European Integration" (1964), 58 *Amer. J. Int. Law* 1; and S.M. Schneebaum, "The Company Law Harmonization Programme of the European Economic Community" (1982), 14 *L. & Policy Int. Bus.* 293.
38. *UNIDROIT* is the French acronym for the International Institute for the Unification of Private Law located in Rome, Italy. Its work is described in David, *supra*, n. 26, ss. 352–71.
39. F.R. Scott, "Section 94 of the British North America Act" (1942), 20 *Can. Bar Rev.* 525.
40. *Ibid.*, pp. 526–28.
41. *Ibid.*, p. 528.
42. Sessional Papers, House of Commons, 1871, No. 16, cited in Scott, *supra*, n. 39, p. 528.
43. *Debates*, House of Commons, 1902, pp. 1067–83. Benjamin Russell appears to have developed a particular interest in section 94. He had previously delivered a paper on "Provisions of the British North America Act for Uniformity of Provincial Laws" at the third annual meeting of the (first) Canadian Bar Association. See *Proc. 2nd and 3rd Ann. Meeting*, Can. Bar Assoc. (Ottawa, 1898), pp. 10, 50.

44. Scott, *supra*, n. 39, p. 529.
45. *Debates*, House of Commons, 1902, p. 1097.
46. Scott, *supra*, n. 39, p. 529.
47. It does not appear to be discussed in such leading texts as Professor Hogg's *Constitutional Law of Canada* or Bora Laskin's *Canadian Constitutional Law* (rev. 4th ed. 1975). There is a brief discussion of section 94 in W.H. McConnell, *Commentary on the British North America Act* (1977), pp. 293–96. However, I am not aware of evidence to support the author's suggestion that it was the abortive results under section 94 that led the council of the Canadian Bar Association to recommend the establishment in Canada of a body similar to the National Conference of Commissioners in the United States. *Ibid.*, p. 295.
48. J.S. Ziegel, "The New Look in Canadian Corporation Laws" in Ziegel (ed.), *Studies in Canadian Company Law* (1973), vol. 2, chap. 1, pp. 62–63.
49. Marvin G. Baer and James A. Rendall, *Cases on the Canadian Law of Insurance* (3rd ed. 1983), pp. 29–30.
50. *Ibid.*, p. 29.
51. *Report of the Canadian Bar Association, 1915*, p. 1, "Constitution", Art. 1:

    > This Association shall be known as the Canadian Bar Association. Its objects shall be to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces, uphold the honour of the profession of law, and encourage cordial intercourse among the members of the Canadian Bar.

52. See e.g., Eugène Lafleur, "Uniformity of Laws in Canada," *Report of CBA, 1915*, p. 20; Sir James Aikins, *supra*, n. 28, p. 77 et seq. and esp. pp. 81–83; *ibid.*, resolutions moved by M.G. Teed, pp. 45–46. See further J. Ogle Carss, "The Codification of Laws" (1920), 40 *Can. Law Times* 451, 458 et seq.
53. Uniform Law Conference of Canada (ULC), "Historical Note," *Proc. 1983*, p. 17.
54. There are many articles and notes discussing the work of the ULC, though much of the literature is essentially descriptive. A convenient bibliography is contained in the annual *Proceedings* of the Conference. See e.g., *Proc. 1983*, p. 22. A critique of the Conference's work appears inter alia in W.H. Hurlburt, "Uniform Law Conference of Canada" (1979), 5 *Commonw. L. Bull.* 246, and in J.S. Ziegel, "Uniformity of Legislation in Canada — the Conditional Sales Experience" (1961), 39 *Can. Bar Rev.* 165.
55. "Historical Note", *supra*, n. 53, p. 19.
56. See in particular ULC, *Proc. 1954*, pp. 20, 102–10 (Append. 1); *Proc. 1973*, pp. 24, 97–107 (Sched. 1); *Proc. 1974*, pp. 35–36, 221 (Append. Z); *Proc. 1975*, pp. 26, 63–65 (Appends. F&G); *Proc. 1977*, pp. 33, 382–91 (Append. T); *Proc. 1978*, pp. 34, 265–68 (Append. R); and *Proc. 1979*, pp. 37, 302 (Append. W).
57. "Historical Note", *supra*, n. 53, p. 20.
58. *Ibid.*, p. 21.
59. According to the writer's count, 98 delegates attended the 1982 annual meeting altogether; 43 attended the uniform law section meeting, 35 the legislative drafting section meetings, and 42 the criminal law section meeting. There was, and usually is, a heavy overlap between delegates to the ULS and LDS.
60. "Historical Note", *supra*, n. 53, pp. 17–18.
61. In earlier years the Proceedings also appeared as an appendix to the Proceedings of the annual meeting of the Canadian Bar Association.
62. See e.g., ULC, *Proc. 1982*, p. 55. Curiously there is no reference to the statement in the table of contents of the *1982 Yearbook of the Canadian Bar Association*.
63. The writer can attest to this from his personal experience and from his discussions with a former president of the Conference. See also ULC, *Proc. 1983*, p. 26 (resolution re relations with CBA).
64. See *infra*, subsection "The Challenge of Law Reform Agencies" in the section "The Current Canadian Position."

65. See ULC, *Proc. 1956*, pp. 16, 41 (Append. D); *Proc. 1971* p. 69, 129 (Append. E); *Proc. 1980*, pp. 31–32.
66. *Cf.* "Historical Note", *supra*, n. 53, p. 17.
67. *Ibid.*, p. 19.
68. For the 1983 list see *Proc. 1983*, p. 16.
69. Of the total of 100 delegates attending the 1983 annual meeting of the Conference, 77 were government officials (77 percent), 12 were law reform agency representatives (12 percent), 8 were practising lawyers (8 percent), and 2 were academics (2 percent). The comparable figures for the 1981 composition of the American commissioners (the latest set available to the writer), based on a total of 238 commissioners (including life commissioners), were as follows: government officials, 40 (17 percent); elected representatives, 23 (10 percent); practising lawyers, 107 (45 percent); law reform officials, 17 (7 percent); judges 10 (4 percent); academics, 37 (15 percent); and miscellaneous, 4 (2 percent). (I am indebted to Charles Hammond and Martin Felsky, two former students, for assistance in making these compilations. The breakdown of the American figures may not be entirely accurate because of the difficulty in some cases of determining the status of a commissioner.)
70. "Historical Note", *supra*, n. 53, p. 19.
71. *Ibid.*, pp. 19–20.
72. *Ibid.*, pp. 20–21.
73. See *infra*, subsection "The Challenge of the Law Reform Agencies" in the section "The Current Canadian Position."
74. See ULC, *Proc. 1977*, pp. 33, 382 (Append. T); *Proc. 1978*, pp. 34, 265; *Proc. 1979*, pp. 37, 306 (Append. W); and *Proc. 1983*, pp. 30, 256 (Append. M).
75. Opinion expressed orally to the writer by a recent president of the Conference.
76. *Proc. 1954*, p. 103 (Append. I).
77. *Cf.* Hurlburt, *supra*, n. 54, p. 249.
78. "Historical Note", *supra*, n. 53, p. 21; *Proc. 1973*, pp. 22, 224 (Append. G); *Proc. 1974*, pp. 56–58.
79. This complaint was first made by Glen Acorn, Q.C., a former president of the Conference. See *Proc. 1976*, p. 82 (Append. F). Though the level of expenditures for special projects has risen in the interval, the complaint still appears to be substantially valid as evidenced by the fact that in the year ended July 15, 1983, the research fund contained a bank balance of $41,861. See *Proc. 1983*, p. 54, col. 2.
80. *Rules of Procedure of the Uniform Law Section*, *Proc. 1985*, p. 65 (Append. G). See also *Proc. 1983*, p. 30 asking the executive committee of the conference to advise the responsible minister in each jurisdiction of the uniform acts adopted at each meeting of the conference. Some of the provincial acts providing for the appointment of commissioners also authorize the commissioners to make recommendations to their government with respect to the adoption of uniform acts. However, in W.H. Hurlburt's experience, the commissioners seldom make use of this power. Hurlburt, *supra*, n. 54, pp. 253–54.
81. This feature of the Conference's work is brought out with probably unintended irony in the following statement "Historical Note", *supra*, n. 53, p. 19: "The appointment of delegates by a government does not of course have any binding effect upon the government which may or may not, as it wishes, act upon any of the recommendations of the Conference."
82. See e.g., *Proc. 1982*, pp. 33, 332 (Append. V).
83. See *Proc. 1983*, Tables I and II, pp. 292–94.
84. See Appendix A to this paper.
85. Hurlburt, *supra*, n. 54, pp. 248–49.
86. *Ibid.*, and compare *Proc. 1976*, p. 85 (Append. G). The amount shown there for "annual contributions" must be adjusted by $1,500 in respect of Alberta's 1976–77 contribution to arrive at the correct 1976 amount.
87. *Proc. 1983*, p. 54, sub. "Receipts" — "General Fund". Of this total, $52,599 was derived from annual contributions.

88. The NCCUSL's total income receipts for 1981 (the latest figure available to me) were $693,608; total disbursements amounted to $465,889. See *Handbook NCCUSL 1981*, p. 79.
89. Even his appointment is comparatively recent, the first such appointment having been made in 1973. See *Proc. 1973*, p. 45 et seq.
90. See *infra*, Appendix A.
91. *Infra*, Appendix B.
92. Ziegel, *supra*, n. 54, p. 199.
93. What follows is an updated and more generalized version of the writer's critique of the Conference's work in the uniform law area expressed by him in 1961. See *supra*, n. 54, p. 182 et seq. My list of the Conference's weaknesses is substantially the same as Mr. Hurlburt's, *supra*, n. 54 pp. 252–55, although I arrived at my conclusions independently of his.
94. An example is provided by the reply of Dr. Robert G. Elgie, Ontario's Minister of Consumer and Commercial Relations to "Submissions by the Joint Committee on the Uniform Personal Property Security Act 1982 on the report of the Minister's Advisory Committee on the (Ontario) Personal Property Security Act." The submissions urged the minister to use his good offices to encourage the advisory committee to bring the draft act prepared by the committee into greater harmony with the uniform act. The minister's reply of November 2, 1984, reads in part as follows:

    > In response to your request that I use my personal prestige and the prestige of my office to encourage my Advisory Committee to study the submissions of the Joint Committee sympathetically and to lend every reasonable assistance in the implementation of the Joint Committee's objectives, may I say that although I support the cause of uniformity I do not think it should prevent us from reaching conclusions that are best designed to meet our needs in Ontario, particularly in such an important field of commercial law.

    There is room as well for improvement in the governmental composition of the delegates to the ULC's Uniform law section. The complaint has been made to me by a senior delegate that the delegates are drawn predominantly from the provincial attorneys-general departments and that other departments are largely ignored. As my informant rightly notes, in several of the provinces responsibility for much of the commercially and consumer-oriented legislation has been transferred from the attorney-general's office to other departments. Nevertheless, the lawyers of those departments are often not represented when uniform acts for whose administration they are responsible are being drafted or existing acts are being revised.
95. See *infra*, subsection "Insurance Law" in the section "The Current Canadian Position."
96. ULC, *Proc. 1981*, p. 52 and (Append. U), p. 326. In his statement to the Canadian Bar Association that year on the work of the Conference, P. O'Donoghue, president of the Conference, referred to the Uniform Evidence Act as "the most important matter dealt with at our recent meeting and perhaps in the entire life of the Conference." *Ibid.*, p. 58.
97. Bill S-33. The *Canada Evidence Act*, 1st Sess., 32nd Parl., 29–30–31 Parl. II, 1980–81–82, 1st Reading, November 18, 1982, 2nd Reading, December 7, 1982.
98. See Proc. Stg. Sess. Comm. on Legal and Constitutional Affairs, 22 June 1983, Issue No. 66 (Append. 66-A), p. 66A:3: "Although this Bill is the final product of a process that extended over several years, it had not been discussed with the entire profession in its present form prior to tabling in the Senate." See also evidence of Robert McKercher, national vice-president, CBA, *ibid.*, 24 March 1984, Issue No. 49, p. 49:6:

    > Although, I will not be dealing with the substance of Bill S-33, I feel, with respect, as they say in my profession, at the outset that I must express on behalf of the Association our opinion that there is a link missing in the evolution of this bill. Particularly, we feel that the proposed Canada Evidence Act does not represent a consensus of Canada's lawyers. It appears to us that the defence bar has been almost entirely excluded in the final consultation process. We suggest this is a fundamental difficulty with the proposed legislation.

Ironically, the Alberta Institute of Law Research and Reform anticipated the criticism. In its press release of August 5, 1982, concerning the Institute's Reports Nos. 37A and 37B, the release admitted that, because of time pressures, outside parties did not have an adequate opportunity to comment on the draft uniform act and that the criminal evidence rules might appear unduly to favour the prosecution. See ULC, *Proc. 1982*, pp. 236–39 (Append. M). To remedy this omission, the Institute recommended an independent review of the criminal evidence rules and thought that the Senate or a Senate committee would be the appropriate body to conduct such a review.

99. See e.g., *Handbook NCCUSL 1981*, Committees of the Conference, Special Conference Committees, Division B et seq., p. 34–44.

100. ULC, *Proc. 1965*, p. 20 (W.F. Bowker); *Proc. 1976*, pp. 81–82 (Glen Acorn); *Proc. 1980*, p. 78 (Gordon F. Coles). See also Ziegel, *supra*, n. 54, p. 182 et seq. and Hurlburt, *supra*, n. 54, pp. 253–54. Mr. Glen Acorn, Q.C., in his presidential address of August 23, 1976 (*supra*, n. 79, pp. 81–82), summed up the position as follows:

> The Conference has for most of its life taken the attitude that it should not actively promote the enactment of its Uniform Acts, that it should simply produce its handiwork and leave it to others to do the work of seeing that they become enacted. The achievement of uniform laws in Canada has apparently suffered from that attitude because those "others" who were supposed to promote the enactment of Uniform Acts too often either were not there or did not bestir themselves to do it. If we had actively promoted the enactment of our products over the years, the Tables of Uniform Acts in the Proceedings would look much different today. The American Conference takes an active role in this area and has a Standing Legislative Committee of 59 members, including 52 liaison members from each jurisdiction, whose main job is to endeavour to secure the enactment of their Uniform Acts.

101. A longtime delegate and former president of the Conference summed up the dilemma as follows in discussions with the author: If my province has an act that appears to be working well and that has encountered no demands for change, if I were to recommend to my attorney-general that we should adopt the uniform act version, he would respond, What is wrong with the existing act? Why change an act that people are content with? (I am paraphrasing the delegate's observation to the best of my recollection.)

102. See *infra*, subsection "Australia" in the section "Comparative Aspects."

103. *Cf.* Hurlburt, *supra*, n. 54, p. 254.

104. See *Report No. 1 of the Permanent Editorial Board for the Uniform Commercial Code, Oct. 31, 1962*, Uniform Commercial Code, 1962 Official Text with Comments, pp. vii, xi.

105. *Cf.* E.H. Taylor, "Uniformity of Commercial Law and State by State Enactment: A Confluence of Contradictions" (1978), 30 *Hastgs. L.J.* 337.

106. Ontario was the first of the provinces to establish a law reform agency, the Ontario Law Reform Commission having been established in 1964. Newfoundland is the most recent of the provinces to have done so; the Newfoundland Law Reform Commission was established in 1971. For a nearly complete list of the provincial and Territorial agencies, see Thos. W. Mapp, "Law Reform in Canada: The Impact of the Provincial Law Reform Agencies on Uniformity", [1982] *Dalh. L.J.* 277, n. 1. There have been several developments since the publication of Mr. Mapp's article. Apart from Newfoundland, the Northwest Territories has also established a law reform committee. On the other hand, the P.E.I. Law Reform Commission appears to have become inactive and the work of the Nova Scotia Law Reform Advisory Commission has been transferred to the staff of the office of the legislative counsel of Nova Scotia.

107. Mapp, *supra*, n. 106, is an eloquent exponent of this point of view. He goes so far as to maintain that "to a large extent the improvements in provincial law that have been gained have come at the expense of uniformity of law among the provinces." *Ibid.*, p. 277.

108. *Ibid.*, pp. 283–91. "To date I know of no instance in which the agencies *coordinated*

their efforts in order to produce a joint report recommending an act which could serve as the model for a uniform act." *Ibid.*, p. 284.

109. *Ibid.*, pp. 284–86.

110. Donovan Waters in panel discussion, "The Future of the Supreme Court of Canada as the Final Appellate Tribunal in Private Law Litigation" (1982 – 83), 7 *C.B.L.J.* 389, 406. In fairness to the opposite point of view, it should be noted that the external commentators on the topic of this paper do not agree with Prof. Waters' pessimistic judgment. They believe that differences in provincial matrimonial property legislation reflect genuine divergences in provincial conditions and social values.

111. Mapp, *supra*, n. 106, p. 305 et seq.

112. There is another difficulty, not adverted to in the text but emphasized to me by a senior Ontario official, and this is that under their governing statutes, most of the law reform agencies are not authorized to delegate their work to another agency. He does not agree with my suggestion that the hurdle could readily be remedied by an amendment to the governing acts; he believes that "it is totally unrealistic" to think that the acts will or would be amended to facilitate this form of interprovincial cooperation. If the official is correct in his assessment of the political situation, then Mapp's pessimism about the prospects for uniform law reform is that much more justified.

113. *Cf. Australian Law Reform Agencies Conference*, Minutes 4th Conference (1977), pp. 6–7.

114. See the detailed account in Mapp, *supra*, n. 106, pp. 291–301.

115. *Report on the Sale of Goods* (3 vols., 1979).

116. *Ibid.*, vol. 1, p. 30.

117. ULC, *Proc. 1981*, p. 34, and p. 185, (Append. S).

118. *Proc. 1982*, p. 531 (Append. HH).

119. Alberta Institute of Law Research and Reform, Report No. 38, *The Uniform Sale of Goods Act*, p. 219 (1982), and Manitoba Law Reform Commission, No. 57, *Report on the Uniform Sale of Goods Act* (1983).

120. Ontario Law Reform Commission, *Report on Products Liability* (1979), p. 125.

121. For the history of the Conference's consideration of the issues, see *Proc. 1980*, p. 34, *Proc. 1981*, p. 32, *Proc. 1982*, p. 34, *Proc. 1983*, p. 30, and *Proc. 1984*, p. 35 and Appendix K.

122. Mapp, *supra*, n. 106, pp. 296–99.

123. Since the writing of the above text, two senior delegates to the Conference have directed my attention to what actually did happen in one instance when the Conference was confronted with conflicting recommendations from two law reform agencies. Between 1975 and 1978, the Conference considered the feasibility of uniform legislation on enduring powers of attorney. Manitoba had one set of proposals and Ontario quite a different set. *Cf. Proc. 1976*, pp. 204–15 (Append. T). The meeting at which these conflicting proposals were discussed was "highly charged" and apparently much ill will was generated because the Manitoba commissioners felt they had not been fairly treated.

124. Another difficulty, encountered in connection with the *Uniform Sale of Goods Act*, arises from the Conference's willingness to let the legislative drafting section make drafting changes to the draft act approved by the Conference without ensuring that the changes do not alter the meaning of the original text.

125. Section 132 reads:

> 132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.

126. *A.-G. Can. v. A.-G. Ontario*, [1937] A.C. 326 (P.C.). *Cf.* the Australian High Court decision in *Koowarta v. Bjelke-Petersen* (1982), 56 *A.L.J.R.* 625, (1981–82) 93 *A.L.R.* 417, holding that the Commonwealth has jurisdiction to ratify treaties pursuant to its

power to make laws with respect to external affairs. The decision is discussed in H. Allan Leal, "Federal State Clauses and the Conventions of The Hague Conference on Private International Law" (1984), 8 *Dalh. L.J.* 257, 277–78. (Since the publication of Mr. Leal's article, the High Court has rendered a further decision reaffirming the broad scope of the Commonwealth government's external affairs power. See *Commonwealth of Australia v. State of Tasmania* (1982–83), 46 A.L.R. 625. I am indebted to Mr. Leal for directing my attention to this later decision.)

127. E.g., *Johannesson v. West St. Paul*, [1952] 1 S.C.R. 292, 303, 306; *Francis v. The Queen*, [1956] S.C.R. 618, 621; *Re Offshore Minerals Rights Reference*, [1967] S.C.R. 792, 815–17; *MacDonald v. Vapor Canada*, [1977] 2 S.C.R. 134, esp. p. 169.
128. E.g., Hogg, *supra*, n. 18, p. 190 et seq.; F.R. Scott, "Labour Conventions Case: Lord Wright's Undisclosed Dissent?" (1956), 34 *Can. Bar Rev.* 114. See also Leal, *supra*, n. 126, pp. 265–68.
129. See Leal, *supra*, n. 126, p. 270 et seq.
130. (1980), 19 *Intern. Legal Materials*, pp. 668–99.
131. Section 93(1) reads:

> (1) If a Contracting State has two or more territorial units in which, according to its constitution, different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

132. The Hague Convention of October 25, 1980 on the Civil Aspects of International Child Abduction was ratified by Canada on June 2, 1983 with respect to Ontario, New Brunswick, British Columbia and Manitoba: Leal, *supra*, n. 126, p. 258. The UNIDROIT Convention on the Uniform Law on the Form of an International Will approved at Washington in 1973 was acceded to by Canada in January 1977 with respect to Manitoba and Newfoundland. Subsequent declarations have been filed in relation to Alberta, Ontario and Saskatchewan.
133. *Proc. 1981*, p. 34.
134. In October 1984, the federal Department of Justice wrote the provinces inviting their support for Canada's ratification of the Convention, but the writer is not aware of the results of this initiative.
135. For further discussion of the issues see J.S. Ziegel, "Should Canada Adopt the International Sales Convention?" in *Meredith Memorial Lectures 1982*, 67, 84–85.
136. *Constitution Act, 1867*, s. 101; *Supreme Court Act*, R.S.C. 1970, c. S-19 as am., esp. ss. 35, 41.
137. Bora Laskin, *The British Tradition in Canadian Law* (1969), pp. 107, 110 – 11.
138. S. C. 1974–75–76, c. 18, s. 3.
139. R.S.C. 1970, c. S-19, s. 36(b).
140. *Supreme Court Act*, *supra*, n. 136, ss. 41, 38.
141. H.E. Read, "The Judicial Process in Common Law Canada" (1959), 37 *Can. Bar Rev.* 265; Laskin, *supra*, n. 137, pp. 60–64.
142. See panel discussion, "The Future of the Supreme Court of Canada as the Final Appellate Tribunal in Private Law Litigation" (1982–83), 7 *C.B.L.J.* 389.
143. Provincial courts of appeal are not bound by the appellate decisions of the courts of other provinces.
144. As of November 2, 1984, the Charter was an issue in 32 cases pending before the Court. *Bulletin of Proc., Sup. Ct. of Can.*, Nov. 2, 1984, p. 1043 et seq.
145. Panel discussion, *supra*, n. 142, p. 443, citing S.J. Bushnell's excellent article in (1982), 3 *Sup. Ct. L. Rev.* 479.
146. *Ibid.*, p. 446, n. 19.
147. The writer expressed the same views in the panel discussion. *Ibid.*, p. 446.
148. See *infra*, "Conclusions."

149. See *Prelim. Conf. and First Meeting, Can. Bar Assoc.*, Montreal, 1896; *2nd and 3rd Ann. Meeting*, (Halifax, 1897, Ottawa, 1898).

150. *Report of the Canadian Bar Association, 1915*, p. 1.

151. Art. 1 of the constitution of the CBA adopted in 1915 provides that the objects of the association are ". . . to advance the science of jurisprudence, promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the basic system of law in the respective provinces." Other evidence of the early interest of the two associations in uniformity of provincial legislation will be found in the paper by Benjamin Russell presented at the second annual meeting of the first association, *supra*, n. 149, n. 43; the address by Eugène Lafleur, "Uniformity of Laws in Canada," *supra*, n. 52, p. 20; presidential address by Sir James Aikins, *supra*, n. 28, pp. 77, 81–83, and resolutions moved by M.G. Teed, *ibid.*, p. 45.

152. Sir James Aikins, K.C., Isaac Pitblado, K.C., and E.C. Leslie, Q.C.

153. ULC, *Proc. 1983*, pp. 51, 50, and 26.

154. As chairman, first, of the Canadian Bar Association's Committee on a Model Uniform Personal Property Security Act and, later, as chairman of the CBA's and ULC's Joint Committee on the Uniform Personal Property Security Act, 1982.

155. See CBA, *Proc. 1982*, p. ii.

156. See J.S. Ziegel, "The Uniform Personal Property Security Act 1982" (1982–83), 7 *C.B.L.J.* 494.

157. There are currently 21 law schools in Canada. In Ontario alone, four new law schools have been established over the past 25 years, viz. at Queen's University, the University of Western Ontario, the University of Ottawa (Common Law Section), and the University of Windsor. Earlier, in 1957, the law degree program of the University of Toronto achieved equal recognition with the Osgoode Hall Law School program for purposes of admission to the Ontario Bar. For a complete list of the law schools, see Can. Assoc. of Law Teachers, *Directory of Law Teachers 1983–84*.

158. *Law and Learning: Report of the Consultative Group on Research and Education in Law*, p. 25. (Social Sciences and Humanities Research Council, April 1983).

159. E.g., the Osgoode Hall Law School and the Manitoba Law School. See further *ibid.*, pp. 12–14.

160. It grew from 137 in 1962 to 560 law teachers in 1976. *Law and Learning*, *supra*, n. 158.

161. The authors of *Law and Learning*, *supra*, n. 158, chap. 4, argue, inter alia, that the law schools are too professionally oriented, but this judgment is not generally shared by law teachers. Even if it were true, a study of existing legal rules and institutions is not inconsistent with a searching critique of their effectiveness and their interaction with social and economic phenomena.

162. In the writer's experience, this is true of all the published texts and casebooks in the basic areas of the law used in the common law schools. Quebec may be a partial exception, for good reason, with respect to materials concerned exclusively with the civil law of the province although, here too, there is a widespread tendency to refer to the laws and experience of other jurisdictions.

163. E.g., Harvard, Yale, Columbia, Chicago.

164. The number of published commercial and institutional monographs (treatises) amounted to 13 in 1958, 97 in 1968, 148 in 1978, and 126 in 1980. Alice Janisch, *Profile of Published Legal Research: Report to the Consultative Group on Research and Education in Law* (1982), p. 5, Table 3.

165. See the studies in volumes 55 and 56, prepared for the Royal Commission on the Economic Union and Development Prospects for Canada by Philip Anisman, Marvin G. Baer, Ronald C.C. Cuming, and William A.W. Neilson. Several of these papers were not available to me during the preparation of my own paper or only became available at a late stage. In any event, except as otherwise indicated, the authors of these papers are not responsible for the accounts that follow.

166. *Constitution Act*, s. 91(2), as interpreted by the courts.

167. *Ibid.*, s. 91(15).

168. *Ibid.*, s. 91(18).
169. *Ibid.*, s. 91(19).
170. *Ibid.*, s. 91(21).
171. *Ibid.*, s. 91(10).
172. Ontario Law Reform Commission, *Report on Sale of Goods*, *supra*, n. 115, vol. 1, p. 8.
173. *Ibid.*, chap. 3, esp. pp. 23–25.
174. *Ibid.*, chap. 2, pp. 8–9. In the United Kingdom, the 1893 Act and the subsequent amendments have now been consolidated in the *Sale of Goods Act, 1979*.
175. *Ibid.*, chap. 2, pp. 13–18.
176. ULC, *Proc. 1981*, p. 34 (Append. S), p. 185, and *Proc. 1982*, pp. 36, 531 (Append. HH).
177. Alberta Institute of Law Research and Reform, *supra*, n. 119.
178. Manitoba Law Reform Commission.
179. See Ronald C.C. Cuming, "Harmonization of Personal Property Security Law" in *Harmonization of Business Law in Canada*, volume 56 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (Toronto: University of Toronto Press, 1985). See also J.S. Ziegel, "Recent and Prospective Developments in the Personal Property Security Law Area," (1985) 10 C.B.L.J. 131.
180. S. C. 1980, c. C-40, s. 178.
181. *Report on the Minister's Advisory Committee on the Personal Property Security Act* (Ontario, Minister of Consumer and Commercial Relations, June 1984).
182. J.S. Ziegel, "The Future of Canadian Consumerism" (1973), 51 *Can. Bar Rev.* 191.
183. The details will be found in *ibid.*, and in W.A.W. Neilson, "The Future of Canadian Consumerism: A Retrospective and Prospective View," *Proc. 10th Ann. Workshop on Commercial and Consumer Law* (1981), p. 179 et seq.
184. Neilson, *supra*, n. 32. See also Louis J. Romero, *Federal-Provincial Relations in the Field of Consumer Protection*, Consumer Research Council (1975).
185. E.P. Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977), 15 *Osgoode Hall L.J.* 327.
186. *Cf.* Neilson, *supra*, n. 32.
187. *Cf.* E.P. Belobaba, "Some Features of a Model Consumer Trade Practices Act", *Proc. 7th Ann. Workshop on Commercial and Consumer Law* (1979), p. 1 et seq.
188. For the history of insurance regulations in Canada see, in addition to Marvin G. Baer's paper, "Harmonization of Canadian Insurance Law" in *Harmonization of Business Law in Canada*, volume 56 of the research studies prepared for the Royal Commission on the Economic Union and Development Prospects for Canada (1985), Baer and Rendall, *supra*, n. 49, pp. 19–21, 23–30; C. Brown and J. Menezes, *Insurance Law in Canada* (1982), esp. pp. 23–33.
189. Vincent C. MacDonald, "The Regulation of Insurance in Canada" (1946) 24 *Can. Bar Rev.* 257.
190. R.S.C. 1970, c. I-15 as am.
191. R.S.C. 1970, c. I-16 as am.
192. A. Pedoe, "Federal versus State Supervision of Insurance: A Canadian View" (1950), 15 *Law and Cont. Prob.* 575.
193. Brown and Menezes, *supra*, n. 188, sec. 2:3:9, p. 26.
194. *Ibid.*, sec. 2:3:9, p. 26.
195. *Citizens' Insurance Co. v. Parsons* (1881), 7 A.C. 96.
196. Brown and Menezes, *supra*, n. 188, sec. 2:3:14, pp. 28–29.
197. *Ibid.*, sec. 2:4:1, pp. 31–32.
198. Baer and Rendall, *supra*, n. 49, p. 30. I recognize, as several colleagues have pointed out, that there is only a token representation of consumers at the meeting. However, this is not because consumer representatives are excluded or ineligible to attend but because consumers are poorly organized and financed and because insurance problems generally rank low in their list of priorities.

199. Baer, *supra*, n. 188.
200. *Ibid.*
201. *Ibid.*
202. *Ibid.*
203. *Ibid.*
204. J.S. Ziegel, "Constitutional Aspects of Canadian Companies" in J.S. Ziegel (ed.), *Studies in Canadian Company Law* (1967), chap. 5, p. 187 et seq.
205. (1881–82) 7 A.C. 96.
206. S.M. Beck, F. Iacobucci, D.L. Johnston, and J.S. Ziegel, *Cases and Materials on Partnerships and Canadian Business Corporations* (1983), chap. 2, p. 67 et seq.
207. *Ibid.*, pp. 158–60, 161–63.
208. Ziegel, *supra*, n. 48, p. 62 et seq.
209. Beck et al., *supra*, n. 206, p. 67.
210. R.S.O. 1970, c. 54.
211. Ontario Legislative Assembly, *Interim Report of the Select Committee on Company Law* (1967).
212. Ottawa, 1971, 2 vols.
213. S. C. 1974–75, c. 33.
214. Beck et al., *supra*, n. 206, p. 68.
215. S. O. 1982, c. 4.
216. David L. Johnston, *Canadian Securities Regulation* (1977), chap. 1; Beck et al., *supra*, n. 206, pp. 861–66.
217. *Report of the Attorney-General's Committee on Securities Legislation in Ontario* (1965).
218. S. O. 1966, c. 142.
219. See now R.S.O. 1980, c. 466.
220. P. Anisman, *The Proposals for a Securities Market Law for Canada: Purpose and Process* (1981), 19 *Osgoode Hall L.J.* 329, 360–61.
221. *Ibid.*, p. 360.
222. *Report on the Royal Commission on Banking and Financing* 1964; Anisman, *supra*, n. 220, p. 331.
223. Ontario Securities Commission, "Cansec: Legal and Administrative Concepts," Nov. 1967; Anisman, *supra*, n. 220, p. 333.
224. Ottawa, Dept. of Consumer and Corporate Affairs, 1979.
225. Beck et al., *supra*, n. 206, p. 487.
226. The best comparative study from a Canadian perspective is that by Professor A. Smith, *supra*, n. 18.
227. The U.S. Supreme Court's decision in *North American Co. v. SEC* (1946), 327 U.S. 686 prompted commentators to assert that the modern commerce power "is virtually limitless." Gunther, *supra*, n. 22, p. 173. Whether the assertion is correct is debatable, but American scholars agree that the case law undoubtedly upholds federal intervention in economic questions significantly affecting the national welfare. The judicial expansion of the commerce power, dating back to the 19th century, was a very conscious process and provides a striking contrast to the equal deliberateness of the Privy Council's restrictive approach to the trade and commerce power in s. 91(2) of the Canadian constitution. ". . . it will, I believe, be the judgment of history that the commerce clause and the wise interpretation of it, perhaps more than any other contributing element, have united to combine the several states into a nation." Justice Stone (1928), 14 *ABA Journ.* 428, 430, cited in Hon. Ivan Rand, Foreword to Smith, *supra*, n. 18, p. ix.
228. See the Supremacy Clause in U.S. Constitution, Art. VI, para. 2. Pre-emption may be implicit as well as explicit. Gunther, *supra*, n. 22, p. 343 et seq.
229. Allison Dunham, "A History of the National Conference of Commissioners on Uniform State Laws" (1965), 30 *Law and Cont. Prob.* 233; *Handbook of the Nat.*

Conf. and Proc. Ann. Conf., July 31–August 7, 1981, p. 349 et seq. (1983). This was the most recent volume of the NCCUSL proceedings available to the author when preparing this paper. Apparently there is usually a substantial delay in the publication of the Conference's proceedings.

230. For a breakdown of the Conference's composition in 1983, see *supra*, n. 69.
231. Legislative counsel usually occupy the status of "associate members" of the conference. See *Handbook NCCUSL 1981*, pp. 23–26.
232. The Conference's receipts in 1981 amounted to $639,608; its expenditures were $465,889. *Ibid.*, p. 79.
233. Professor Wm. J. Pierce of the Michigan University Law School is the Conference's executive director. The Chicago office consists of a full-time executive secretary, a legislative director, and three other persons, one of whom (the bookkeeper) is part-time. I am indebted to Professor Pierce for this information.
234. See *Statement of Policy establishing Criteria and Procedures for Designation and Consideration of Acts*, *Handbook NCCUSL 1981*, pp. 383–87, and "Origin, Nature and Scope" statement, *ibid.*, p. 350.
235. See Committees of the Conference, *Handbook NCCUSL 1981*, p. 30 et seq. As will be seen, reporters are usually drawn from the teaching profession.
236. See "Criteria and Procedures Statement", *ibid.*
237. *Ibid.*, p. 387, Section 7, "Obligation of Commissioners."
238. See Appendix C.
239. *Uniform Commercial Code: 1978 Official Text with Comments*, p. xv et seq. (1978).
240. Dunham, *supra*, n. 229, p. 244 et seq.
241. *Cf. ibid.*, pp. 237–38.
242. "Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute," reprinted in The American Law Institute, *The American Law Institute 50th Anniversary* (1973), p. 11 et seq.
243. Fifteen restatements were completed between 1923 and 1944. Since 1952 eight Restatements Second have been started or completed. The details appear in *ibid.*, pp. 119–59.
244. American Bar Association, Committee on Corporate Laws, *Model Business Corporations Act* (rev. 1969, 1971).
245. *The Commonwealth of Australia Constitution Act*, 63 and 64 Vic., chap. 12 (U.K.).
246. Colin Howard, *Australian Federal Constitutional Law* (2nd ed., 1972), p. 10 et seq. (legislative powers), p. 27 et seq. (interpretation of supremacy clause: s. 109).
247. *Commonwealth Act*, s. 51(i).
248. *Ibid.*, ss. 51(xiii), (xiv), (xvii).
249. Howard, *supra*, n. 246, chap. 5, pp. 251–59 (scope of Commonwealth trade and commerce power), chap. 6, pp. 412–22 (corporations' power).
250. John Goldring, "Unification of Laws in Australia — The Great Pipe-dream" (1977), 1 *Unif. L. Rev.* 82, esp. p. 116 et seq.
251. The topic is well covered in the periodical literature. In addition to the comprehensive article by Goldring, *ibid.*, see R.H. Leach, "The Uniform Law Movement in Australia" (1963), 12 *Am. J. Comp. Law* 206; R. Cranston, "Uniform Laws in Australia" (1971), 30 *Pub. Admin.* (Australia) 229; and Bowen, *supra*, n. 30.
252. Goldring, *supra*, n. 250 pp. 89–91.
253. *Ibid.*, pp. 91–94; H.A.J. Ford, *Principles of Company Law* (3rd ed., 1982), pp. 20–24.
254. Goldring, *supra*, n. 250, p. 91 et seq.; Bowen, *supra*, n. 252.
255. By Goldring, *supra*, n. 250, p. 115 et seq.
256. By Bowen, *supra*, n. 30 p. 490 et seq.
257. Goldring, *supra*, n. 250, p. 216 et seq.
258. Ford, *supra*, n. 253, pp. 20–23.

259. *Ibid.*, pp. 23–24.

260. See generally M.D. Kirby, "Uniform Law Reform: Will We Live to See It?" (1977), 8 *Syd. L. Rev.* 1; G. Sawyer, "Federal-State Cooperation in Law Reform: Lessons of the Australian Uniform Companies Act" (1963), 4 *Melb. U.L. Rev.* 238; Sen. Evans, "Uniform Law Reform and the Case for a National Law Reform Advisory Council" (1983), 8 Rep. of the *Austr. Law Reform Agencies Conference* 192 (hereafter "ALRC").

261. See paper by E. Freeman and discussion following it in (1977), 4 ALRC 6, and paper by Sen. Evans, *supra*, n. 260.

262. Trebilcock et al., *supra*, n. 35, encountered similar difficulties in trying to estimate the cost of provincial barriers to the free flow of goods, capital, and labour. Nevertheless, some of their findings may also help to explain the low level of interest in uniform legislation not involving conscious discriminatory policies.

The authors estimated (chap. 12, p. 548) that in 1974 the value of interprovincial trade in goods and services amounted to about $43 billion. This compared with international trade flows in that year from Canada of approximately $33 billion. The authors also calculated that about two-thirds of all economic activity in Canada involves transactions which do *not* cross either international or interprovincial boundaries (*ibid.*) and that approximately 20 percent of all trade activity only crosses interprovincial boundaries. The authors' conclusion was (p. 552) that "the overall impact of interprovincial barriers to interprovincial flows of goods, capital, and labour seems to have been exaggerated." They further expressed the view that the main distortionary policies appear to be federal rather than provincial in origin. (This latter finding of course has no relevance in determining the need for interprovincial harmonization of laws.)

I have some important reservations about the conclusions drawn by Professor Trebilcock and his colleagues, but this is not the place to argue the point.

263. There are intermittent exceptions when a problem develops a sufficiently high political profile to attract a minister's attention and the problem only can be resolved effectively by uniform action. A recent example involves maintenance and custody orders, which often must be enforced extraprovincially. A federal-provincial committee was established, which met and defined what they felt should be the principal features of a uniform act. "Following that, at the behest of Ontario and Manitoba, this was placed on the 1984 agenda of the Conference with a request that consideration proceed swiftly because the committee hoped to be in a position to put a Uniform Act before a meeting of Attorneys General later in 1984. The matter was, in fact, dealt with on that basis." (I am indebted to Mr. Arthur Close for this information and the quoted words are his.)

264. For some recent examples, see the conflicting appellate court decisions on the compellability of corporate officers to give Crown evidence in criminal charges against their corporation reviewed in *R. v. N.M. Paterson & Sons Ltd.*, [1980] 2 S.C.R. 679; the doctrine of constructive notice with respect to commercial registration acts [*Kozak v. Ford Motor Credit Co. of Canada Ltd.* (1971), 18 D.L.R. (3d) 735 (Sask. C.A.), *GMAC of Canada Ltd. v. Hubbard* (1978), 87 D.L.R. (3d) 39 (N.B.C.A.), and *Acmetrack Limited v. Canadian National Bank* (1985), 48 O.R. (2d) 49 (C.A.)]; and the admissibility of extrinsic evidence to contradict a written agreement [*Gallen v. Allstate Grain Company Ltd.* (1984), 9 D.L.R. (4th) 496 (B.C.C.A.), and *Hayward v. Mellick* (1984), 45 O.R. (2d) 110 (C.A.)].

265. See *supra*, subsection "Identifying the Role of the Supreme Court of Canada" in the section "The Current Canadian Position."

266. I am not aware of any other suggestion along these lines in Canada and, with respect to the role of the Supreme Court itself, most of the debate has focussed on entrenching the Court's position in the Constitution Act. There has been, however, considerable discussion in the United States with respect to the desirability of establishing a National Court of Appeals to relieve the caseload pressure on the U.S. Supreme Court. A proposal to this effect was made in the *Report of the Study Group on the Caseload of the Supreme Court* (Federal Judicial Center, 1972). See further G. Casper and R.A. Posner, "A Study of the Supreme Court's Caseload" (1924), 3 *J. Legal Studies* 339, and C. Black Jr., "The National Court of Appeals: An Unwise Proposal" (1974), 83 *Yale L.J.* 883.

267. *Cf.* J.S. Ziegel, "The Future of the Supreme Court of Canada as the Final Appellate Tribunal in Private Law Litigation" (1982–83), 7 *C.B.L.J.* 441, 445. Some authors have also criticized the Court for granting leave to appeal too readily in private law cases. B.J. Reiter and J. Swan, "Developments in Contract Law: The 1980–81 Term" (1982), 3 *Sup. Ct. L. Rev.* 115, 133–38.

268. The suggestion is scarcely novel. During the 1970s there were both federal and provincial proposals to increase the size of the Supreme Court to 11 judges. A similar proposal was made by the Pepin-Robarts task force. For the particulars, see P. Russell, "Constitutional Reform of the Judicial Branch: Symbolic vs. Operational Considerations" (1984), 17 *Can. J. Pol. Sc.* 227, 237. All these proposals, however, were motivated by political considerations and not by a desire to enable the Court to handle a larger caseload.

269. The bureaucratization of U.S. courts, especially at the appellate and Supreme Court level, is a well documented feature of some U.S. courts and is attracting much attention. See the literature cited by Professor I.R. MacNeil, "The Future of the Supreme Court of Canada as the Final Appellate Tribunal in Private Law Litigation" (1982–83), 7 *C.B.L.J.* 426, 434–35, n. 14. So far the problem has been ignored in Canada on the assumption (erroneous?) that it does not exist here.

    The notion that an appellate court with more than nine members lacks collegiality is surely questionable. At least two provincial courts of appeal (Ontario and Quebec) have more than nine members. The judicial side of the House of Lords is in an unusual position. Its members comprise the Lord Chancellor for the time being, the Lords of Appeal in Ordinary, and such peers of Parliament as hold or have held high judicial office. See *Appellate Jurisdiction Act 1876*, ss. 5, 25. Pursuant to the *Administration of Justice Act 1968*, s. 1(1), the maximum number of Lords of Appeal in Ordinary is 11, but the maximum may be increased by Order in Council. I have not heard it suggested that these tribunals lack collegiality or an esprit de corps because of their larger size. In fact, the members of the House of Lords are said to attach great importance to their colleagiality. Alan Paterson, *The Law Lords* (1982), p. 89 et seq.

270. There is no statutory requirement for a full Supreme Court to decide constitutional cases but the convention favouring it has been established for too long for it to be changed even if it were otherwise desirable. Chief Justice Bora Laskin also favoured nine-member court decisions in non-constitutional appeals, but this goal proved too ambitious and had to be abandoned. It is unlikely to be pursued again in the foreseeable future.

    Plenary court hearings are very demanding of the Court's time and resources. This is an added reason why they should be used sparingly and why the Court should be rigorous in limiting leaves to appeal to cases of genuine public importance.

271. This is because its mandate is exclusively determined, and its members are selected and appointed, by the federal government. Hence the ongoing and still unresolved debate about constitutionalizing and reforming the Supreme Court. See e.g., W.R. Lederman, "Thoughts on Reform of the Supreme Court of Canada" (1970), 8 *Alta. L. Rev.* 1; Russell, *supra*, n. 268; and James C. MacPherson, "The Potential Implications of Constitutional Reform for the Supreme Court of Canada" in S.M. Beck and Ivan Bernier (eds.), *Canada and the New Constitution: The Unfinished Agenda* (1983), p. 161 et seq.

272. See Gerald E. LeDain, "Concerning the Proposed Constitutional and Civil Law Specialization at the Supreme Court Level" (1967), 2 *Rev. Jur. Thémis* 107.

273. The agreement reached in 1957 between the provincial law societies for the reciprocal recognition of law degrees conferred by extra-provincial law schools has removed the previous barriers to the development of flexible and nationally oriented curricula. There is a movement afoot at the present time (1984) to review current educational and curricular requirements for the conferment of LL.B. degrees. Whatever the merits of such a review, it is at least encouraging that the law societies appreciate the need to move in tandem in this important area.

274. See *supra*, subsection "The Influence of Legal Scholarship" in the section "Other Unifying Sources."

275. See *supra*, the subsection "Constitutional Background" in the "Introduction."

276. This has been recognized by at least one distinguished member of the Supreme Court, Mr. Justice Ivan C. Rand, who, writing extrajudicially, noted that, "the development of this Dominion power, with its vital interest for every part of the country, has been unrealistic and inadequate." Ivan C. Rand, Foreword to A. Smith, *The Commerce Power in Canada and the United States* (1963), p. v.

277. E.g., by Estey, J., dissenting, in *Multiple Access Ltd. v. McCutcheon* (1982), 138 D.L.R. (3d) 1 at 36 (S.C.C.); *A.-G. Can. v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206, per Dickson J. at 259 ("the limits of s. 91(2) are not fixed, and . . . questions of constitutional balance play a crucial role in determining its extent in any given case at any given time), and 267–68 (indicia for a valid exercise of the trade and commerce power).

278. Ivan Rand's observations are again apposite: "Although compromise is of the essence of many if not most of political problems, it is a clumsy expedient — nowhere provided in the Constitution Act — where single action is not only more directly and immediately effective, but harmonizes regulation within the broadest field of vital national interest and concern." *Supra*, n. 276, p. xii.

2

The Regulation of the Securities Market and the Harmonization of Provincial Laws

PHILIP ANISMAN

What the world now needs is not competition but organization and co-operation. . . .

Bertrand Russell, *Education and the Social Order 111* (1932)

Introduction

Securities regulation in Canada is provincial. Since the initial *Sale of Shares Act* was enacted in 1912 in Manitoba,[1] legislation governing access to and activities in the Canadian securities market and even the structure of the market itself has, apart from prohibitions in the Criminal Code against manipulation and other fraudulent conduct,[2] been the exclusive preserve of the provinces.[3] The territorial limitation on provincial legislative jurisdiction,[4] however, has from early times forced the provinces and their administrative creations to seek methods of coordinating the content and enforcement of their laws in order to prevent evasion and avoid the imposition of unnecessary costs on businesses operating in a market that is inevitably interprovincial. In fact the degree of cooperation between the provinces has risen dramatically in the last 20 years accompanied by a general recognition that the Canadian market is national and increasingly international in scope and spurred by intermittent recommendations that the federal government enter the field.[5]

The Manitoba Act of 1912 served as the primary model for early Canadian securities acts.[6] But the first uniform act, called the "Security Frauds Prevention Act", was enacted by Ontario in 1928[7] and, after a meeting of provincial representatives, was adopted in 1930 by eight of the nine provinces "for the most part only with slight variations," by Newfoundland in 1931 and by New Brunswick in 1935.[8] By that time, how-

ever, the uniformity represented in the initial legislation had begun to wither as a result of a series of diverse amendments in individual provinces designed to require disclosure by issuers offering their securities to the public.[9] Despite further attempts to "correlate and make uniform" administrative practice under the various provincial statutes through meetings of all of the Canadian securities administrators in 1934 and 1938,[10] which subsequently became annual affairs, the legislation and administrative procedures and policies continued to diverge to the extent that by 1960 the leading text on the subject described them as a "hodge-podge of miscellaneous provisions adopted more or less at random from the statutes of other jurisdictions, rarely amended, and scattered through the statute books more as an obstacle course to the legal profession than an effective protection for investors."[11]

A major impetus toward uniformity was provided in 1965 by the *Report of the Attorney-General's Committee on Securities Legislation in Ontario* which recommended revision of Ontario's securities laws through adoption of a procedure for distributions of securities modelled on that in the United States, introduction of more comprehensive disclosure requirements for public corporations consisting of a narrative form prospectus, semi-annual financial statements, mandatory proxy solicitation at least annually accompanied by prescribed information, and reporting of trades by insiders in securities of their corporations, as well as the imposition of civil liability for improper insider trading and a scheme for the regulation of takeover bids.[12] After consultation with officials of other provinces, the recommendations were implemented in the *Ontario Securities Act, 1966*.[13] The new Act was quickly adopted, again with minor modifications, in Alberta, British Columbia, Manitoba and Saskatchewan, and in 1973 Quebec added provisions substantially like Ontario's on financial disclosure, insider trading and takeover bids, as had Parliament to its *Corporations Act* in 1970.[14]

Although the *Kimber Report* is usually viewed as the foundation of modern Canadian securities legislation,[15] it did not provide any greater degree of permanence or of uniformity than the earlier instance of Ontario's leadership in 1930. Indeed, since 1966 the pace of securities law reform in Canada has accelerated.[16] In 1970, only four years after its new legislation, the Ontario Securities Commission published a report recommending changes to the regulation of takeover bids and an even more dramatic renovation of the disclosure system along lines advocated in the United States a year earlier.[17] The suggestions concerning takeover bids were enacted in Ontario within a year and were followed substantially in Alberta and Manitoba in 1972, but not in British Columbia or Saskatchewan, the two remaining "uniform act" provinces.[18] As the recommendations concerning disclosure involved a new conceptual basis for the disclosure requirements of the Ontario legislation and a concomitant new structure, they were embodied in a wholly revised bill which was introduced in the Ontario Legislature in 1972 to invite com-

ments with a view to providing a *new* uniform act to be "adopted by almost all jurisdictions across Canada."[19]

Although that bill and the five that followed it were discussed at meetings of the Canadian securities administrators, by this time held semi-annually, the aspirations of uniformity have not been fulfilled. Only one province, Alberta, has implemented an act based on the new *Ontario Securities Act, 1978*, but it was not enacted until 1981 with the result that it included a number of variations necessary to correct oversights in the "model" statute;[20] and more significantly, it diverged from the Ontario statute on several issues of policy, both major and minor.[21] Although one other province, Manitoba, had passed an act more closely following Ontario's in 1980, it has not yet been proclaimed and in the past few months amendments to the old act were enacted by the Manitoba Legislature.[22] And while Quebec adopted a new act in 1982, its conceptual structure and the bases of many of its provisions lay elsewhere.[23]

Until this year no further adoptions seemed likely, for a British Columbia initiative published in 1982 had been allowed to die.[24] In June, however, the Nova Scotia Legislature enacted a new Securities Act designed to bring that province's legislation into conformity with the "uniform act" provinces and largely following the Ontario Act.[25] It is already apparent that even this attempt at uniformity has not been wholly successful. The new Nova Scotia Act codifies a number of the practices adopted under the Ontario Act and in other provinces, as well as recommendations on the regulation of takeover bids contained in a recent report prepared for the Ontario Securities Commission,[26] presumably in anticipation of parallel amendments in Ontario and elsewhere, but it appears unlikely that the amendments in other jurisdictions will coincide with those predicted in the new Act.[27] In short, the potential for uniform legislation appears even more remote now than it did in 1960.

The overall impact of the various provincial regimes of securities regulation is not as diverse as the legislative differences might suggest. In a federal state in which the provinces cannot extend their legislative authority beyond their territorial boundaries, cooperative efforts to address common concerns are inevitable, especially in view of the fact that securities markets and perpetrators of fraud are not respectful of artificial barriers supposedly created by borders. The need for interprovincial cooperation at least with respect to enforcement was early acknowledged by the "warrant backing" provisions in the initial uniform acts[28] and again during the 1930s in the attempts to regain uniformity, this time with respect to public offerings of shares.[29] Canadian securities administrators have met annually to further both of these goals since the early 1950s; in 1963 the meetings were increased to two and have continued on a semi-annual basis, presumably because of the increasing ease of interjurisdictional communications and securities trading and of the growing and apparently unending stream of policy initiatives.[30]

Although apparently unable to achieve legislative uniformity, the

Kimber Report, assisted by recurring intimations of federal legislation, appears to have encouraged an existing desire to minimize unnecessary duplication, the basis of the early thrusts toward uniformity, both with respect to enforcement by administrators and compliance by those subject to the legislation.[31] In 1967 the Ontario Commission floated its proposal for a national securities commission based on federal-provincial cooperation[32] and shortly after its lack of acceptability became clear, the provincial securities administrators published a series of national policy statements applicable throughout the country dealing primarily with distributions of securities and regulation of mutual funds.[33] At the same time the administrators from the five Western provinces, those with "uniform acts," agreed to a number of common uniform act policies addressing distributions and the continuing disclosure obligations required under their recent legislation.[34] Since then the process of policy formulation has become somewhat more formalized; proposed national policies are frequently published for comment and respondents are invited to send their submissions to all of the provincial and territorial administrators and on occasion also to interested industry self-regulatory organizations.[35] Moreover, it is now common for two or more provincial administrators to undertake studies of potential new policy developments with a view to presenting their results to the others,[36] and there have been consistent attempts to coordinate local policies with national ones and with the local requirements of other provinces.[37] These processes have been complemented by the use of joint hearings not only with respect to policies, but also in connection with adjudicative proceedings.[38] The provincial administrators have thus gone to great lengths to avoid conflicts between their divergent schemes and to emphasize their regulatory compatibility. Indeed, if there is a modern goal among the administrators, it is no longer uniformity but rather compatibility, as was emphasized by the Quebec Commission with respect to its new act.[39] In fact, it may be that there is now more cooperation between provincial securities administrators and more coordination of their legislation, policies and procedures than ever before.

Whether the immediate aim is described as uniformity or compatibility, however, is less important than its underlying impetus. Both terms suggest a desire to avoid inconsistent requirements which would create impediments to the efficient functioning of the securities market and thus undermine rather than promote the ultimate purposes of the legislation, namely, enhancement of the raising of capital by corporate issuers.[40] It is perhaps for this reason that the early efforts toward uniformity and the national and uniform policies focussed primarily on the distribution of securities,[41] although this emphasis might also be explained in part as an attempt to prevent unnecessary duplication of administrative efforts and the delays caused by differing demands from

several provinces which may seem inordinate for relatively minor items of disclosure.[42] The latter consideration certainly underlies the means adopted to ensure uniformity, or at least comity, with respect to other disclosure documents like insider trading reports and proxy-information circulars.[43]

The reasons for seeking uniformity, or compatibility, may differ with respect to substantive rules like, for example, a requirement that a purchaser of a controlling block of shares at a premium make an offer at an equivalent price to purchase the holdings of the minority shareholders of the acquired corporation.[44] If the laws of one province impose greater burdens than those of others, persons engaging in the regulated activity may be able to avoid them by conducting their business elsewhere or by excluding residents of that province from participation in a particular transaction. The resultant differential treatment of similarly situated investors may undermine their apprehension of the market's integrity and frustrate the provincial administrator as well as the broader goals of the legislation.[45] In a federation in which the provinces cannot legislate extraterritorially a common requirement may be the only means of addressing such issues, and some commentators have suggested that in these cases uniformity of the laws may be more important than their content.[46]

An uncompromising commitment to uniformity, however, may be contrary to one of the fundamental premises of federalism, namely, the ability of individual provinces to develop their own policies to address local needs and goals. In fact, an attempt was made to accommodate such interests in the first national policy statement through retention of local discretion to refuse to accept a national prospectus.[47] And the current chairman of the Ontario Commission has recently put forward the potential for provincial diversity as a reason against federal regulation of the Canadian securities market.[48] Nonetheless, his Commission continues to describe "uniformity or compatibility" as "one of its principal objectives".[49] The juxtaposition is not surprising, for both uniformity and diversity are representative of deeper co-existing values which must permeate provincial regulation of interprovincial and national markets. Indeed, the recent history of Canadian securities regulation might not unreasonably be viewed as a reflection of the tension between them in a variety of contexts in which the balance appropriate to their accommodation must depend on the specific subject matter in question, as is implicitly recognized in the seemingly divergent positions of Ontario officials just described.[50]

Once uniformity and diversity are accepted as intermediate goals, as means rather than ends, it is readily apparent that an undue emphasis on either may be counterproductive. Uniformity of legislation may, for example, avoid duplication and delays and enhance the effectiveness of substantive regulation, but an overweening commitment to it may

enable a strong province to advance its own interests unduly or may lead to the adoption of laws that are misguided or represent the lowest common denominator of interprovincial compromise[51] and may result in the stifling of innovative solutions to new problems. On the other hand, while local autonomy may enable experimentation through the adoption of diverse policies by provincial legislatures,[52] the differences may permit easy evasion of stricter laws through forum shopping[53] or may themselves create impediments to the operation of the market.[54] For reasons like these, different accommodations between local policy goals and the desire for uniform regulation on a national basis have been accepted with respect to disclosure requirements, substantive rules of conduct, registration of dealers and advisers and supervision of stock exchange activities, the major elements of securities regulation.[55] The nature of the competing interests involved, the techniques adopted to accommodate them and whether their resolution has been or can be satisfactory through the harmonization of provincial laws are the subjects of this paper.

Provincial Securities Regulation

The Regulatory Schemes

Securities legislation has traditionally harnessed three regulatory techniques to provide protection to investors, namely, disclosure concerning corporate issuers so that purchasers of securities might make a rational assessment of an investment vehicle before parting with their funds, licensing of securities professionals to ensure the integrity and competence of persons dealing with investors and frequently holding money or securities for them, and civil and criminal remedies, the former to provide compensation to damaged investors and the latter to prevent harm to them usually through prohibitions against fraud and other conduct contrary to the legislative prescriptions. In recent years all three devices have undergone substantial alteration, both in concept and application, and have also been supplemented by direct regulation intended to prescribe protective procedures or to ensure fair treatment in certain types of transactions such as takeover bids.[56]

DISCLOSURE

The disclosure schemes in modern securities legislation are designed to enable all investors, whether in the primary or trading market, to make their decisions to purchase and sell securities in the light of full current information about the issuer.[57] Although the early securities acts were directed at prospectus disclosure in connection with new issues of securities in order to protect investors against the sales efforts of pro-

moters often relating to investments of dubious value,[58] the focus of the legislation gradually shifted to the substantially greater volume of secondary trading on stock exchanges[59] and accordingly to reporting by corporate issuers of the state of their affairs at regular intervals and of significant developments as they occur so that investors might assess the merits of a given investment at any time in the belief, bolstered by the efficient market hypothesis, that its current price reflects the issuer's prospects.[60] This movement has tended to reduce the importance of the prospectus and to treat it as merely another element of a more comprehensive scheme.[61] As a result the conceptual basis of the disclosure system has arguably moved from distributions to continuous disclosure by all issuers whose securities are publicly traded.[62] Such "reporting issuers" are required to file and send to shareholders an annual information circular in connection with the issuer's annual meeting[63] and annual and quarterly financial statements and to disclose on a timely basis material changes in their affairs.[64] An issuer's disclosure file should thus present a reasonably complete picture of its position and prospects at all times.

Utilizing these developments, securities acts have increasingly sought to preclude the sale to public investors of securities of issuers that are not subject to this continuous disclosure regime, unless the issuer will become so as a result of the sale itself.[65] A new issue of securities thus requires a prospectus, which confers "reporting" status upon the issuer, unless it is sold under an exemption permitting sales to persons who are capable of making the investment decision in question without the protection otherwise provided by the statute.[66] Securities so sold, however, may not be resold, except in an exempt transaction, unless the issuer is a reporting issuer, has been one for a sufficient period for its disclosure file to show its recent history and has complied with the legislative disclosure requirements.[67] The acts thus ensure that securities may be sold generally to investors only where sufficient information is available to enable them to make rational investment decisions.[68] This so-called "closed system" has also provided a basis for reducing the disclosure obligations of issuers in connection with distributions of securities by enabling them to rely on their disclosure file and thus take an issue to market more quickly with an abbreviated prospectus.[69] Not surprisingly, the implications of these developments for other aspects of the legislation are still being explored.[70]

Licensing

Securities regulation invariably involves the licensing of market professionals[71] and the Canadian acts require brokers, dealers, salesmen, underwriters, advisers, and even issuers in some provinces to be registered before trading in securities.[72] Whatever method is adopted for the

imposition of these requirements,[73] their purpose is generally to ensure that persons who carry on a business of trading in securities with or on behalf of public investors have the integrity, competence and financial stability thought necessary by the administrators,[74] and each of these qualifying criteria may form the basis for more specific regulatory provisions governing market conduct, dealings with clients and supervisory and other structures within a registered firm.[75] Registration may also provide a basis for controlling aspects of the business and structure of registrants for purposes other than investor protection. In recent years it has so been adopted by at least one prominent province to determine the non-securities businesses, if any, in which securities firms may engage,[76] the persons who may have an ownership interest in a registrant and the permissible percentage, if any, of such interests,[77] as well as the nature of professional participation in the securities market by other types of financial intermediary.[78] Indeed, a current study undertaken by the Ontario Securities Commission concerning the exemptions from registration seems to be more concerned with protection of the securities industry than of the investing public.[79]

The supervisory jurisdiction implicit in a licensing scheme has also been adapted to the regulation of stock exchanges and other self-regulatory organizations.[80] In order to ensure against the dangers inherent in self-regulation, namely, the potential for restraints on competition designed to protect an organization's members and the dual risks of lax and overzealous enforcement, several commissions have been empowered to review and reverse any rule or other action by the stock exchange in their province.[81] They may also recognize exchanges outside the province for specific purposes and thus obtain, in effect, equivalent powers over the rules relating to the area of recognition.[82] In fact, a commission's jurisdiction over a registered self-regulatory organization may be more far-reaching than that over other registrants; because a stock exchange, for example, performs public functions, a commission may require it to alter its rules and may also be authorized to subdelegate to it some of its own regulatory powers under the legislation.[83] These powers may also be extended to related operations; a few commissions have extended their supervisory jurisdiction to clearing agencies.[84] The techniques associated with licensing thus serve as well to allocate and supervise the administration of quasi-governmental functions by industry bodies.[85]

Direct Regulation

Canadian securities acts are by no means limited to disclosure and licensing; they impose a wide variety of substantive obligations both directly and indirectly often in combination with one of the other regulatory devices. Conditions of registration may, for example, provide a

means of requiring compliance with standards established by a commission.[86] Similarly, prospectus clearance may enable a commission to assess the viability of the offering, as well as the adequacy of the description of it and the issuer, and to refuse to approve those that do not meet its merit criteria. In fact, the provincial securities acts all authorize the exercise of such discretion by administrators[87] and they have used it actively to establish limits to promoter's compensation by issuers as diverse as mining companies,[88] mutual funds[89] and film promotions[90] to reduce the proportion of risk borne by investors[91] and to govern potential conflicts of interest, especially in pools of capital collected for further investment.[92] A number of such policies with respect to mutual funds are included in the most recent legislation,[93] while published policies in effect create an independent regulatory regime for other types of investment funds.[94]

Some securities commissions have also used their "blue sky" discretion to address issues that relate as much to the rights of shareholders as to investment risk or merit. The interim policy recently adopted in Ontario and Quebec concerning restricted shares, for example, goes beyond both disclosure and risk to require, if prospectus clearance is to be obtained, that holders of non-voting shares and shares with "restricted" voting rights be entitled to participate equally with common shareholders when a takeover bid is made for the latter's shares.[95] The commissions will exercise a similar discretion to issue a cease trading order to prevent implementation of a reorganization or amalgamation involving an exchange or conversion of common shares into restricted or non-voting shares unless a majority of the minority shareholders, including existing holders of such shares, approves the transaction.[96] The latter requirement applies an approach that the Ontario Commission had previously adopted to regulate "going private" transactions.[97] The Ontario Commission has attempted to justify these incursions into the governance of corporations as deriving from its mandate to prescribe standards higher than those required by corporate law "on a very current basis" in order "to preserve investor confidence in the capital markets."[98] Nor is there any likelihood of its altering its views on such matters; both it and its Quebec equivalent are currently proposing to the Canadian administrators policies to control defensive share issues in connection with takeover bids.[99]

Takeover bids and insider trading provide the primary examples of direct regulation in the provincial statutes. Several of the acts simply prohibit insider trading and all of the "uniform" legislation imposes civil liability for improper trading by insiders.[100] Takeover bids receive fuller legislative treatment; the statutory scheme governing them was enacted to enable offeree shareholders to make a rational decision concerning the acceptance of an offer, usually made at a premium and often for less than all of the outstanding shares, by alleviating the pressures to accept immediately

created by such bids. The securities acts therefore prescribe a code of conduct for takeover bids which requires disclosure concerning the offer, the offeror and the offeree corporation, specifies time periods for the offer and for shareholders' withdrawal rights and imposes substantive obligations that ensure offerees an equal opportunity to accept a bid, especially with respect to offers for less than all shares.[101] The 1978 Ontario Act was modified to provide greater equality of treatment to shareholders of an acquired corporation by the addition of a requirement that a purchaser of a controlling block of shares at a premium make a takeover bid to the remaining shareholders at an equivalent price,[102] and this requirement has resulted in other extensions to ensure equality of treatment to offerees and other shareholders.[103]

Remedies

The treatment of violations of the securities laws, whether they involve negligent or fraudulent misstatements, a failure to disclose required information or a breach of a substantive obligation, raises issues among the most difficult currently presented. Securities acts invariably prohibit such contraventions and impose criminal penalties for them,[104] but the effectiveness of these provisions is questionable both because of limited enforcement capabilities of the administrators and the relatively minor nature of the penalties specified.[105] While a statutory right of action might provide a useful supplement to government enforcement because its compensatory basis contains an incentive for those who suffer harm to sue, the civil remedies in the provincial statutes have been limited to prospectuses, takeover bid circulars and insider trading.[106] The most effective remedial devices under the statutes, therefore, are the powers granted to the commissions to prohibit trading in a specific security either generally or by particular individuals, to prohibit a distribution from proceeding, to prohibit a person from trading at all and to discipline registrants for improper conduct by suspending or denying their registration.[107] These powers may be supplemented by authority to freeze the funds of a person and to apply to the courts for an order requiring compliance with the statute or appointing a receiver.[108]

The most contentious issues with respect to remedies relate to the scope of civil liability. The securities acts do not create a cause of action for manipulation, misrepresentations of whatever nature in continuous disclosure documents, breaches of substantive duties or for insider trading through a stock exchange where the party trading with the insider is not identified.[109] The failure to deal with these issues is indicative of their complexity. Liability for conduct that affects the securities market presents a potential for large damage awards, possibly against an issuer, and invokes the spectre of class actions with a plaintiff class consisting of all persons trading in a specified security during the

period of the violation. The difficulties are increased in the context of a misrepresentation or failure to disclose, for the relevant period may then extend until correct information is disseminated.[110] Obviously any attempt to provide a compensatory remedy to persons harmed by improper conduct affecting the market price of securities must address these issues; and courts in the United States have begun to do so by defining the harm to limit the size of the plaintiff class,[111] by allocating burdens of proof[112] and by specifying a maximum liability based upon a defendant's profit.[113] These issues were also addressed in the *Federal Securities Code* proposed by the American Law Institute and the *Proposals for a Securities Market Law for Canada* both of which contain schemes of civil liability for market conduct which limit the potential for draconian damage awards on the basis of the nature of the defendant, the type of document involved and the degree of culpability of the conduct in question.[114] These issues cannot be avoided under a statutory continuous disclosure regime. In fact, they are currently under consideration by the Ontario and Quebec Commissions.[115]

Even this cursory overview of the means adopted in securities legislation to ensure an honest and efficient market must reveal that the regulatory concepts themselves are in a state of constant development reflected in the pace of legislative and administrative action. The treatment of each of these areas, and indeed of any provision of the statutes, presents a continuing need for interprovincial cooperation and a test of its effectiveness. The approaches taken by the provinces and their administrators, therefore, will be addressed in connection with these major regulatory elements.

Coordination and Cooperation

Continuous Disclosure

As disclosure requirements in multiple jurisdictions necessarily impose overlapping demands on issuers, Canadian legislators and administrators have attempted to coordinate their schemes to minimize duplication of effort in the production of the mandated information. They have perhaps been most successful with respect to the continuous filings that provide the basis of the statutory disclosure systems in the "uniform act" provinces and Quebec. All of these jurisdictions require an issuer that has distributed securities to public investors in the province to file annual and interim financial statements,[116] annual information circulars relating to shareholders' meetings and monthly reports by insiders of their trading in their corporation's securities.[117] Three of these provinces have imposed a statutory duty to publish and file on a timely basis information concerning significant developments relating to an issuer,[118] two more, Manitoba and Nova Scotia, have similar but unproclaimed

requirements,[119] and a uniform policy to the same effect but without the filing obligation or statutory force is applicable in three provinces, including Manitoba.[120] As a province may have no continuing authority over a non-provincial issuer once the sale of its securities has been completed, the Kimber Committee, relying in effect on the importance of Ontario in the securities market,[121] recommended that an undertaking of future compliance by an issuer and its insiders be obtained as a condition of acceptance of its prospectus.[122] While this approach was initially incorporated in all of the uniform acts and still remains in three,[123] the recent statutes premise the obligations on reporting issuer status and rely on the benefits to be obtained from it under the closed system to ensure compliance.[124]

Continuous disclosure filings are likely to create difficulties for reporting issuers only if the nature of the required disclosure differs in a manner that cannot be accommodated in a single presentation or if the statutory filing periods differ sufficiently to require continual preparation of new reports for different jurisdictions. Such burdens have generally been avoided; the statutes permit an issuer to file documents required elsewhere that contain substantially the same information, sometimes pursuant to an exemption granted by the commission.[125] All of the six provinces with "compatible" legislation have exercised their discretionary powers in such circumstances to permit issuers to provide the same information in a different format than required by their act so long as the filings meet the statutory temporal requirements in each jurisdiction[126] and they have tended as well to adopt consistent policies governing exemptions.[127] Ontario has also indicated a willingness to reduce the filing obligations where they are more onerous than those in an issuer's jurisdiction of origin, but only with respect to interim financial statements, for example, by accepting semi-annual rather than quarterly statements; the more basic annual filings do not receive similar treatment.[128] And two provinces, those with less active trading, do not require insiders to file with them if the reports are filed in and obtainable from the issuer's home jurisdiction, unless the issuer has a "local connection" indicating the likelihood of continuing investor interest in the province.[129]

Even in the current climate of cooperation, differences between statutory filing periods may present some difficulties for issuers. The Ontario and Alberta Commissions have attempted to mitigate some of the harsher consequences that might flow from an early filing by an issuer in compliance with the shorter periods under United States law; because compliance with the requirement that reports be sent to shareholders when they are filed would create difficulties for such issuers, the Commissions permit them to send the reports to shareholders at the later, local legislative time, provided that they issue a press release in Canada at the time of filing.[130] This type of problem has become more

common since the adoption of the new Quebec Act which contains shorter temporal requirements than the other provinces.[131] As a result, some efforts at coordination with other provinces have been necessary; Ontario has recently amended its policy to permit issuers to file annual financial statements in accordance with the procedure just described,[132] and Quebec has on occasion followed a similar policy, implemented through its power to grant exemptions, for filing of quarterly financial statements by Canadian issuers that report nationally.[133] However the terms of the latter policy are not yet clear, for such exemptions have not been granted in all cases and the criteria upon which the Commission distinguishes between applications are not apparent from the reasons included in its weekly bulletin.[134] The Commission's current tendency appears to be to deny such exemptions. In any event, the need for interprovincial accommodation in this area is likely to continue, for the Quebec Commission has under consideration an amendment to its Act that would enable issuers to disseminate the information in quarterly financial statements without sending them to shareholders.[135]

Similar problems may arise in connection with reports of trading by insiders. Insider reports were initially required to be filed within ten days of the end of the month in which a person achieved insider status, whether by obtaining a position with an issuer or 10 percent of its voting shares, and on a monthly basis thereafter.[136] Following the *O.S.C. Disclosure Report* the time for reporting by insiders who acquire 20 percent of an issuer's outstanding shares was reduced to three days after the acquisition and subsequently within the same time after reaching a further 5 percent level.[137] As these requirements do not reflect a potential acquisition of control quickly enough, two of the provincial acts now require an initial report within ten days after a person becomes an insider.[138] Even a ten day period has been found to be too slow with respect to defensive purchases during the course of a takeover bid;[139] both the triggering percentage and the reporting period in that context have been further reduced in three provinces and the proposed Ontario amendments will provide yet another variation in these rules.[140] Although compliance with these requirements is relatively mechanical, the variety of time periods may result in an unintended offence even by sophisticated purchasers, as occurred under the new Quebec Act in connection with a recent nationally contested takeover bid.[141]

Because "insider" is usually defined to encompass the directors and officers of all affiliated members of a corporate group, the filing requirements for all of them would be unnecessarily widespread.[142] Most commissions have therefore adopted policies exempting directors and officers of affiliates of a reporting issuer who are not likely to obtain confidential information with respect to the issuer as a result of the affiliation.[143] Most have also granted exemptions from the reporting requirements for purchases made pursuant to an executive compensa-

tion plan established by an issuer so that the directors and officers who benefit from the plan may file annually with respect to purchases under it.[144] The regulations in Quebec contain a similar exemption for such purchases, but also provide that any filing made by an insider prior to the annual report must also include purchases made for him under the plan.[145] As a result of the express requirement an application for an exemption from the caveat, based on administrative inconvenience to the plan's administration and the uniform exemption obtained elsewhere, was initially refused by the Quebec Commission's Director and was granted on appeal only through the exercise by the Chairman of his casting vote.[146] The Chairman made clear, however, that he did not view the decision as a precedent for other similar applications. Nevertheless, the decision appears to have become exactly that and the Commission's practice now appears to be the same as elsewhere in the country.[147]

The statutory timely disclosure requirements raise slightly different issues with respect to cooperation between the provincial commissions. All three of the provisions now in force permit an issuer to refrain from releasing material information if doing so would be harmful to its interests, but the standards justifying secrecy and the procedures concerning it differ in each.[148] The most restrictive provision, Quebec's, requires disclosure if there is reason to believe that any trading has been or will be conducted on the basis of the confidential information.[149] While an issuer might therefore be entitled to avoid making timely disclosure in Alberta and Ontario when it must do so in Quebec, compliance with the stricter requirement would prevail, for once a release is published under it the issuer would be obliged to file it in the other two provinces[150] and, in any event, publication in Quebec would make the information generally available. In short, where provisions differ but do not require inconsistent conduct, an issuer will comply with all of them by meeting the highest standard.

A more difficult problem may arise, however, where non-disclosure is permissible under all of the provisions. The Ontario Act requires a confidential filing with the Commission, and the Commission has indicated in a policy that it will not ordinarily release such information without first providing an opportunity for a hearing.[151] In fact, it is arguable that even then disclosure by the Commission would be contrary to the statute.[152] Nevertheless, there may be circumstances in which the Commission might wish to inform another commission of the information in the confidential filing for enforcement reasons. As no such case has received publicity, there is no indication of how the Commission would resolve this problem, but its policy suggests that it might be prepared to inform another administrator of relevant data without holding a hearing. As it is questionable whether such action would be proper, a preferable approach would be to issue a cease trading order which would alert other administrators and invite similar action by them.[153]

In summary, although there are and will continue to be differences between the continuous disclosure provisions of the provincial acts, the provincial commissions have achieved substantial success in coordinating their diverse requirements, through the development of new policies,[154] the adoption of consistent policy statements and the avoidance of conflicts and unnecessary duplication of information in different formats. The few continuing differences do not appear to be of great consequence as issuers can generally comply with the more onerous demands of a particular province once they have chosen to become subject to its jurisdiction. Nevertheless, in view of the ease of dissemination of information by means of modern technology it might be questionable whether duplication of filings serves a purpose other than to verify that the documents have been filed somewhere. It is difficult to believe that information made public in Montreal could not find its way to Alberta investors if the document were not filed with the Alberta Commission, or for that matter, that the filing in Alberta is the means through which it does so now. It might be more efficient, for nationally traded securities, to require filing in only one jurisdiction and to utilize the automated information services to disseminate such information to stock exchanges and securities firms and indeed to the commissions across the country.[155]

Distributions of Securities: Of Prospectuses and Closed Systems

Prospectus Clearance

Jurisdictional differences with respect to public offerings of securities, whether they relate to disclosure or merit requirements, may cause issuers greater concern than the inconveniences associated with uncoordinated continuous disclosure filings. Delays in obtaining clearance of a prospectus may affect the price at which an issue may be sold or, worse still, may result in deferral, abandonment or failure of the distribution because of a change in the market.[156] Understandably, dissatisfaction with the process will increase if the delays appear to derive from minor differences over seemingly unimportant details of the offering between the administrators in the ten provinces (and two territories) in which a prospectus for a national issue must be accepted.[157] It was probably for these reasons that securities distributions were one of the two aspects of corporate law concerning which there was early agreement on the need for uniformity[158] and that continuing complaints about the failure to achieve it have focussed on prospectuses.[159]

Uniform legislation, however, does not seem as important as the policies adopted to govern prospectuses and the processing procedures of the provincial commissions, for the disclosure standards under the statutes following the *Kimber Report* permit a flexible format so long as a prospectus discloses all relevant information,[160] and the commissions,

largely influenced by the Canadian Committee on Mutual Funds in the late 1960s, have adopted national policies to guide the exercise of their blue sky discretion with respect to such funds, the most common types of continuing national issuers.[161] In fact, the cooperative efforts of the Canadian administrators have tended to emphasize prospectuses; most of the national policies relate to their contents or standards for approval[162] and several provinces have attempted to further coordination of national and local requirements through exemption or the adoption of local policies.[163] Moreover, policies adopted by a particular commission concerning its criteria for acceptance of a prospectus are published as local policies so that an issuer may comply with the strictest to reduce delays or determine not to distribute its securities in that province.[164] In short, the dominant issue with respect to distributions has been the time taken to clear a prospectus for a national issue of securities, as was recognized implicitly by the fact that the first national policy statement established a procedure to accelerate this process.[165]

National Policy No. 1 built on the practices that had been followed before its adoption. Prior to 1971 all of the provinces except Alberta and Quebec tended to rely on Ontario to clear national issues and usually on the province of origin for regional distributions.[166] In fact, many of the statutes condoned this procedure by expressly authorizing acceptance of a prospectus filed elsewhere in Canada.[167] The period required for national clearance, therefore, depended on the processing period in Ontario and delays were usually no longer than the time necessary to file a certificate of Ontario's acceptance and a signed prospectus with the other provincial commissions; the average time varied from three to six weeks (assuming that no additional delays occurred in the three vetting provinces).[168] And an issue by an established "blue chip" corporation might receive approval across the country in as little as one week.[169]

The initial national policy attempted to codify these procedures and specify shorter examination periods. It envisaged the selection of a "principal jurisdiction" which would take responsibility for reviewing a preliminary prospectus and settling any deficiencies with the issuer on behalf of all of the commissions; the initial review was to be completed within ten days and comments from other provinces received within a further five after which a final prospectus would be prepared and presumably accepted.[170] The policy required that both preliminary and final prospectuses, the latter signed in accordance with the statutory prescription, be filed in each jurisdiction in which an issue was to be sold.[171] The procedure has not been an unblemished success. An early commentator suggested that after its adoption clearance of national issues was slower than previously[172] and an amendment to the policy, adopted in 1978 to reflect a practice that had developed under it, suggests that the responsible commission has not always been able to facilitate acceptance in every province.[173] In any event, as before, the speed of clearance is dependent on that of the "principal jurisdiction."[174]

A new policy, adopted in 1978 "to accelerate the review procedure" for seasoned issues is also indicative of less than satisfactory experience under National Policy No. 1.[175] Mutual funds, which continuously distribute their shares, and other issuers with distributions extending beyond 12 months must file a new prospectus annually.[176] Although the uniform securities acts allowed a grace period of 20 days to permit its acceptance without an interruption of sales,[177] the commissions apparently required a longer period to process a renewal prospectus and had adopted a policy advising such issuers to file their preliminary prospectus 30 days before the first anniversary date of the one last filed;[178] and this procedure has been fixed in the new legislation.[179] National Policy No. 30 enables and the recent acts require mutual funds and other regular issuers of securities when refiling to submit a second copy of their revised prospectus showing the changes from the current one with a view to review by the commissions only of the elements of the renewal document that differ from its predecessor in order to reduce the vetting time.[180] While the policy reflects the continuing concern of the commissions over this question and a praiseworthy effort cooperatively to improve their performance, the fact that it was necessary as late as 1978 for the securities of such seasoned issuers, even though the earlier policy and the recent legislation allow 50 days for acceptance before an outstanding prospectus will lapse, raises continuing doubts about the success of the commissions' cooperative ventures in this area.[181] It may be that the apparently lengthy periods of clearance are attributable as much to the "principal jurisdiction" as to the cooperative procedures,[182] but it seems questionable nevertheless that cooperation prior to 1982 provided an adequate solution.[183]

In 1982 the provincial administrators again addressed this seemingly perennial problem in an attempt to enable established issuers to raise capital in a fast changing market context and entered upon a further cooperative effort that appears to have achieved substantial success. A proposal developed by a group of investment dealers at the invitation of the chairman of the Ontario Securities Commission and modified by the Quebec Commission was published with a request that comments be sent to all of the Canadian administrators.[184] The policy, premised on the continuous disclosure system modified to include an annual report with prospectus-like information, is intended to allow senior issuers to clear an issue nationally within no more than ten days of their decision to go to the market.[185] Issuers with demonstrated stability, based upon the market value of their shares held by public investors or the rating of their preferred or debt securities,[186] that have been reporting issuers for three years and are not in default of any filing obligations may file an "annual information form," a substitute for a full prospectus that is subject to review by the commissions.[187] Once its form has been accepted by the administrators an issuer can distribute its securities to the public through a short form prospectus, containing only basic information

about the issuer and the offering and incorporating by reference the information in its continuous disclosure file, which would be cleared in accordance with the procedure in National Policy No. 1 with the periods modified to three working days for the initial deficiency letter by the "principal jurisdiction" and two for the response from the other administrators. If the offering is "too complex" for such summary treatment, the periods in the National Policy will apply. The policy was adopted in British Columbia, Ontario and Quebec in October 1982,[188] in Alberta a few days later[189] and in Manitoba and Saskatchewan early in 1983.[190] It has since been amended to make the national policy clearance procedure applicable to the initial filing of an annual information form[191] and is apparently being considered for adoption as a national policy.[192]

The provincial administrators have exercised their discretionary powers in order to facilitate implementation of the new policy. Although in most provinces reporting issuer status for three years is a prerequisite, the commissions have been willing to grant exemptions to blue chip issuers that cannot meet this condition but fulfill all of the others,[193] and several of the provinces have adopted this practice with respect to issuers that meet the three year requirement in a province other than their own provided that the issuer files its continuous disclosure file from the other province, usually but not always Ontario, for the earlier period.[194] In fact, the Alberta Act expressly authorizes this procedure while in other provinces it has been adopted by policy statement.[195] This practice is likely to be necessary less frequently under the Quebec Act which allows a one year reporting issuer to utilize a "simplified prospectus."[196] As this difference may present complications for a national issue, the Quebec Commission has attempted to accommodate it to the usual clearance procedures. The Commission has stated its willingness to permit the use of a simplified prospectus in Quebec alone following an accelerated clearance and contemporaneously to act as the "principal jurisdiction" under National Policy No. 1 for distribution of the securities outside the province.[197] And it will, of course, act as the principal jurisdiction with respect to issuers that meet the standards of the other provinces.[198]

The "prompt offering qualification system," as the policy is generally known, provides a useful illustration of the dynamics and deficiencies of a multijurisdictional approach to regulation of a national market as well as the benefits of cooperation and coordination. The policy has apparently not been adopted in any of the Maritime provinces.[199] And the jurisdictions that have adopted it have done so by at least three different methods. The Alberta, British Columbia and Ontario administrators have adopted local policy statements and apparently clear short form prospectuses under them;[200] the Manitoba and Saskatchewan Commissions have declared their acceptance of the system, each in a local policy, but require an application for an exemption from the statutory

prospectus obligation in the former province for the issuer and in the latter for each issue distributed under the policy;[201] and in Quebec the policy has been included in the statute.[202] These differences would be trivial and hardly worth mentioning in other than a footnote but for the fact that the manner in which the prompt offering qualification system was adopted in Alberta and Ontario might render it invalid, for the statutes authorize general variations to the contents of prospectuses only by regulation.[203] If this interpretation is correct, all such distributions would violate the Ontario and Alberta Acts unless they are specifically exempted, a practice not followed in these two provinces;[204] and those for which Ontario, Alberta or British Columbia serve as the "principal jurisdiction" would contravene the British Columbia Act, but a Quebec or Manitoba based distribution would not.[205] While it is likely that the policy will be included in the Alberta and Ontario Acts,[206] legislative amendments and even new regulations invariably involve delays and timing differences that may impede an otherwise beneficial scheme.

Even if the policy has been validly implemented in these provinces, its terms are not the same throughout the country. As initially adopted the policy, following the practice with prospectuses, required an auditor's consent to the referential incorporation of audited financial statements in a short form prospectus. The Ontario, Quebec and British Columbia administrators concluded that this requirement imposed too great a burden and amended the policy to delete it,[207] but the Alberta, Manitoba and Saskatchewan Commissions retained it and the latter two went further and required an auditor's "comfort letter" for subsequent unaudited financial statements in an issuer's file.[208] As issuers have been able to fulfill the stricter requirement, at least in Alberta, it has become clear that an auditor's consent does not create an obstacle and Ontario and British Columbia, but not Quebec, have returned to the original position. But they still do not require "comfort letters."[209] Similarly, in the last few months the policy has been extended to apply to secondary offerings and securities exchange takeover bids; the amendment has been accepted in Manitoba, presumably Saskatchewan, and partially accepted in British Columbia, but not elsewhere.[210] Moreover, as with all regulatory matters, the modification of current requirements is an ongoing process; the Ontario Commission has undertaken a continuous review of experience under the policy with a view to future amendments.[211] And the Quebec Commission, once again moving into the vanguard, has recently proposed a form of shelf registration of short form prospectuses that would permit well seasoned issuers to file a prospectus at an early stage and subsequently sell the securities upon the filing of a notice containing last minute details. The Commission has, of course, undertaken to discuss its proposed policy with the other administrators.[212]

In short, despite an exemplary level of cooperation in its adoption and administration, the policy has not been accepted nationally, imposes different requirements in different provinces, is still in a state of development which is likely to continue to create differences between the provinces and may be ineffective in the provinces that are crucial to its effectiveness. Nevertheless, the experience with the treatment of auditors under the policy might be viewed as a productive method of working out a common policy, as yet unattained, based on experience with divergent requirements, and the policy itself from all indications appears to have served a useful purpose, in fact its intended purpose, with respect to issuers as the number of annual information forms filed with the commissions seems to indicate.[213] It would likely work even more efficiently, however, if the approval of the designated "principal jurisdiction" were accepted automatically by all of the participating administrators unless that jurisdiction discovers a matter that might contravene a blue sky policy under any act. Obviously such a case would be highly unlikely in view of the nature of the issuers that qualify under the policy. That this approach has not been adopted may suggest a residual mistrust or lack of confidence in some provincial administrators on the part of others.

Exemptions: The Closed System

As the prospectus requirements are intended to ensure that purchasers have sufficient information to enable them to evaluate an investment being sold, the securities acts exempt sales to investors who can obtain and assess equivalent information without statutory sanction or who for other reasons do not need the legislative protection.[214] Thus by selling its securities under an exemption an issuer may raise capital, or create an incentive plan for its employees, without incurring the delays or costs associated with the preparation and filing of a prospectus.[215] Consistency of standards and administration is therefore also important to an issuer making an exempt distribution, whether to financial institutions, existing shareholders or employees, across the country. Minor differences between provinces in the terms of an exemption or the policies affecting its availability may cause unnecessary delays and adjustments or may result in inadvertent illegality or different treatment of shareholders or employees in different provinces.[216] In fact, a committee formed by the Canadian securities exchanges to address issues relating to regulation of exchange traded options and futures recently concluded that minor variances both within and between jurisdictions in Canada caused "confusion as to the rules for each product" and necessitated uniform treatment.[217]

Although the exemptions in the provincial acts are generally similar, there are at least two distinct exemptive schemes in the Canadian legislation.[218] The older uniform statutes require a prospectus only

when a distribution is made by an issuer or a controlling shareholder and must, therefore, rely on inferences concerning the investment intentions of exempt purchasers to ensure that an offering is not made to public investors without a prospectus.[219] Alberta, Ontario and Quebec have attempted to achieve a higher level of investor protection through implementation of a "closed system;" in those provinces securities sold under an exemption may not be resold to public investors unless the issuer is a reporting issuer with an up to date continuous disclosure file and the exempt purchaser has retained the securities for a specified "holding period" which varies with the investment quality of the securities themselves.[220] Although Manitoba and Nova Scotia have enacted acts based on Ontario's, neither has been proclaimed and it does not appear likely that the other provinces will follow suit.[221] Moreover, specific exempting provisions in the "uniform" legislation may differ in detail and in the exercise of discretion governing their use.

As in other areas, the provincial commissions have generally attempted to avoid unnecessary inconvenience to issuers by coordinating their treatment of specific exemptions. Their efforts in this regard, however, appear to have been less formal than with respect to prospectuses; although there are a number of local policy statements concerning exemptions, there are no national ones and only one "uniform" one, based on Ontario's practice with rights offerings before 1971.[222] Nevertheless, prior to the proclamation of its new Act the Alberta Commission effectively adopted the closed system in a policy statement relating to its discretion to grant exemptions and the British Columbia Superintendent has done so as well.[223] Attempts at interprovincial accommodation are also reflected in the circumstances in and terms on which individual exemption applications are granted to national or international issuers. Exemptions have been allowed, for example, to facilitate a corporate repurchase by an issuer with shareholders in several provinces or an amalgamation in which the successor corporation is a reporting issuer in another province,[224] to permit a transaction that is exempt in a neighbouring province[225] or to rectify gaps common to several acts.[226] Indeed, the Alberta Commission appears to have been willing to accept a prospectus or other disclosure document cleared in Ontario without itself reviewing it in order to avoid harsh consequences to its residents from the restrictions on resale under the closed system, even though it would not do so with a prospectus for a national distribution.[227] Each of these provinces has, in effect, granted a reporting issuer from the other province local reporting issuer status to enable its shareholders to resell securities after the statutory holding period[228] and both have waived the restrictions on resale to enable a minimal number of local shareholders to trade securities obtained from a non-provincial reporting issuer provided that they resell them outside the province.[229] Finally, both the Alberta and Manitoba Commissions have approved the sale in their

province of shares of junior issuers distributed through the Toronto Stock Exchange, in effect adopting the approval of the Exchange's policy by their Ontario counterpart.[230]

Nevertheless, differences between the provinces remain. All of the uniform acts, for example, exempt sales by an issuer of its own securities to its employees, presumably to encourage investment by employees in their employer and to enable the issuer to provide incentive options to key employees.[231] The exemption is automatic in all provinces except Quebec where an offering notice must be submitted to the Commission for review and sent to all employees before they purchase any securities.[232] And the Quebec Commission's policy with respect to this exemption, at least in one context, appears to diverge from that of the others. Ontario, for example, readily allows issuers to distribute securities to their non-employee directors, thus providing through a discretionary power a seemingly uncontroversial extension of the statutory provision, while the Quebec Commission appears to have denied use of the exemption in similar circumstances.[233]

The securities acts contain a substantial number of exemptions, many with detailed conditions governing their availability and use.[234] As the scheme and detail of the exemptions, especially in the recent statutes adopting a closed system approach, are the most technical parts of the legislation, a comprehensive analysis of them would be unnecessarily lengthy and complex and will not be attempted here.[235] Nevertheless, an understanding of the manner in which the commissions have sought to make their regulatory demands compatible requires closer consideration than the preceding overview. A somewhat fuller discussion of two of the more significant exemptions, those respecting the acquisition of "seed capital" by small issuers and rights offerings to existing shareholders, may provide a better sense of the administrators' cooperative achievements in this area of their expertise.

Seed capital exemption A "seed capital" exemption, based upon the one for "limited offerings" recommended in an early draft of the *A.L.I. Federal Securities Code*,[236] was first adopted in Canada in the *Ontario Securities Act, 1978* to enable a small issuer to obtain initial venture capital from a limited group of non-institutional investors.[237] To prevent possible abuses, however, and to ensure that investors be in a position to make a knowledgeable investment decision, the statute imposed a series of conditions. An issuer was entitled to use the exemption only once, a promoter could be involved in no more than one such distribution in any twelve month period and no advertising or promotional expenses were allowed. It was permissible to solicit no more than 50 prospective purchasers, sales could be made to no more than 25 and all such transactions had to be entered into, but not completed, within six months of the first sale. Investors were guaranteed an opportunity to

evaluate the offering by a requirement that they be sufficiently wealthy and sophisticated to be able to do so themselves or be advised by a registered dealer or adviser other than a promoter who is, and that they be given "access to substantially the same information concerning the issuer that a prospectus . . . would provide."[238] Even before the provision came into effect the Commission announced its view that the prescribed number of prospective and actual purchasers was not limited to those in Ontario.[239] Moreover, although none was required by the statute, the Commission stated its expectation that an "offering memorandum" would be used in connection with seed capital solicitations and sales and a regulation governing such memoranda was adopted.[240] Finally, the limited offering provision proved insufficient for distributions of securities designed to take advantage of tax sheltering, so-called "government incentive securities,"[241] and a special provision with altered conditions was included in the regulation for them; in short, the solicitation-purchaser figures were raised to 75 and 50, an offering memorandum was required and the limitations on the period of a distribution and on an issuer's and promoter's use of the exemption were removed.[242]

Although the seed capital exemption has been implemented in three other provinces, and adopted but not proclaimed in two more,[243] there are sufficient differences of detail that an issuer desirous of using it interjurisdictionally may run into difficulties. Since 1979 both the Alberta and British Columbia administrators have followed the Ontario approach, but with some variation, when exercising their discretionary powers to exempt distributions from the prospectus requirements.[244] The Alberta Commission subsequently issued a policy in anticipation of a new Securities Act which again contained elements to be found neither in the Ontario Act nor in its own.[245] In fact, the Alberta Act followed Ontario's with only a few modifications; it included the government incentive provision in the statute and expressly stated that the maximum numbers for both exemptions include solicitees and purchasers in all jurisdictions. It also substituted for Ontario's prospectus-equivalent condition a requirement that purchasers be given enough information for a prudent investor to be able to "make a reasoned judgment" and authorizes further use of the exemption by the same issuer, provided that it occurs only once in any twelve month period and that subsequent offerings are not for more than three million dollars, and it limits the period of an exempt offering of government incentive securities to six months.[246]

The Quebec Act enacted a year later also contains minor variations. Like Alberta, it treats seed capital and government incentive offerings in the same manner, including the maximum number of permissible purchasers, which remain 25 and 50 respectively; but it does not restrict the number of offerees and does not require or specify the contents of an offering memorandum if one is used. Although these changes seem to make the exemption

more readily available, the Act also narrows its utility for tax shelter issuers by limiting its use for this purpose as well to once per issuer and to once in twelve months by a promoter.[247] Moreover, the statute requires that the Commission be notified before any solicitations are made and also before the distribution is concluded;[248] and the Commission has published a proposed policy statement that would require 15 days prenotification and a quite detailed offering memorandum.[249]

The policy statement published in British Columbia differs again. The Superintendent will normally grant an exemption for an offering seeking up to 200 purchasers, but the investors must meet specified wealth criteria, the minimum investment must be $25,000 and the distribution must be completed within a year.[250] If an offering is to be made in more than one province, evidence of its approval elsewhere must be filed in British Columbia unless that is its principal jurisdiction, and an exemption will not be available when a prospectus is used in another province. Finally, although Manitoba has recently adopted a policy concerning private offerings to individuals meeting financial standards similar to those in British Columbia, it is not a seed capital exemption, but rather an extension to individuals of the Manitoba private placement provision for investments of $97,000.[251] Indeed, the Manitoba Commission's approach to exemptions for tax shelter investments appears generally restrictive.[252]

The differences between the seed capital provisions now in effect in Canada thus contain sufficient inconsistencies of seemingly minor detail to require extreme caution on the part of an issuer seeking venture financing. It is possible for such an issuer to fashion an offering that complies with the requirements of each jurisdiction. But small issuers are more likely to find their capital in a single province, a fact which may explain the lack of any attempt at coordination of these sections by the provincial administrators. The variations are likely to have a greater impact on issuers and promoters of government incentive securities. Even they may comply with all of the statutes, but only by juggling jurisdictions, if necessary, for an initial offering and delaying subsequent offerings by the same promoter in Quebec.[253] While it is possible to justify each of the differences on the basis of the policy preferences reflected in them, it is questionable whether they are all sufficiently significant to warrant their consequences for tax shelter investments, if not for seed capital financing. This is a question that is worthy of the cooperative consideration of the provincial commissioners.

Rights offerings The exemption for rights offerings permits an issuer to raise additional capital from its existing shareholders without a prospectus because they are likely to be familiar with its affairs.[254] Nevertheless, in order to ensure a minimal level of investor protection, most of the provincial acts require the issuer to provide the administrator with

a notice outlining the details of a contemplated distribution and condition its entitlement to proceed with the exempt offering on the administrator's failure to object within a specified period or on the issuer's ability to satisfy his objections.[255] For the most part rights offerings appear to have been approached in a cooperative manner which facilitates their use by national issuers; the uniform act provinces adopted a policy which specifies the information to be included in an issuer's notice, requires that it be sent to shareholders as well and outlines the standards which will usually be applied. And the policy seems to have been accepted in Quebec.[256] Indeed, the policy stresses that it is not intended "to hamper" offerings under the exemption.

A few differences, however, do exist between the provincial rights offering regimes. The review period specified in all the acts but one is ten days; the Quebec Act requires fifteen.[257] Although it is doubtful that an additional five days would create a serious impediment to a rights offering in many cases, the need for the longer period has not been demonstrated.[258] More significantly, the Ontario Commission has promulgated an additional policy which imposes a number of substantive, blue sky standards to limit the use of the exemption; if an offering is intended to finance "a major new undertaking" or "the reactivation" of a dormant issuer or would effect a substantial increase in the outstanding securities of the class to be sold, a prospectus must be filed. Not only has the Commission declared that the exemption may not be used in connection with a major financing but it has also refined a majority shareholder's fiduciary obligation by extending the policy to protect minority shareholders against any other than a pro rata increase in the holdings of a controlling shareholder or associated person.[259] Although the former element of the policy has been accepted only in Quebec[260] and the latter only in British Columbia with respect to issuers based primarily in that province[261] and probably in Quebec,[262] the Ontario Commission applies its policies to all rights offerings unless the number of shares held by Ontario residents is insignificant.[263] Larger national issuers are unlikely to be adversely affected by the higher Ontario standards for they are unlikely to contravene them when making a rights offering; but the policy may forbid a rights offering which is permissible in other provinces and thus have the effect of excluding Ontario residents from participation or of precluding the issuer from making it at all.[264] While the Commission may be justified in imposing higher than corporate standards to protect Ontario investors, although even this conclusion is highly debatable at least with respect to its "green shoe" policy, its insistence on its prerogative on this matter can hardly be viewed as an effort at coordination of its policies with those of other provinces, with the corporation laws of its own province or even with the other exemptions in its own act.[265]

Rights offerings also provide an illustration of the interjurisdictional

implications of the closed system in the recent provincial acts and of the manner in which the commissions have responded to them. As the closed system is intended to prevent the sale to public investors of securities of an issuer concerning which information is not generally available, security holders who purchase rights in an exempt distribution cannot resell them or the securities acquired upon their exercise, other than in an exempt transaction, unless the issuer has been a reporting issuer for at least a year and has complied with the continuous disclosure requirements.[266] Not surprisingly the major focus of administrative concern over such resales has been on non-reporting issuers, and the Ontario policy precludes rights offerings by such issuers unless they ensure that the rights are not transferable in Ontario and advise their Ontario security holders of that fact in the offering circular.[267] In fact, this approach reflects a more general preoccupation with the potential for securities initially sold under an exemption to find their way into the public market without a prospectus having been filed, as is shown in consistent attempts by the administrators to prevent "backdoor" distributions, that is, distributions to provincial investors through a series of transactions beginning with an exempt sale to a purchaser outside the province.[268]

Two recent applications to the Ontario Commission for an exemption from its rights offering policy for resales by Ontario shareholders evoked these concerns in the context of the regulatory schemes in other provinces. In September 1983 Consolidated Ascot Petroleum Corporation, a reporting issuer in British Columbia since at least February 1982, but not in Ontario, with its shares listed on the Vancouver Stock Exchange, applied for an exemption to permit its Ontario shareholders to resell rights and other securities acquired under its proposed rights offering through the Vancouver Exchange in compliance with the law of British Columbia.[269] A little under one third of the issuer's almost 7,300,000 outstanding common shares were held by approximately 230 Ontario residents. (There were almost 1,000 shareholders.) The Commission denied the application stressing the importance for the closed system under its legislation of an issuer having "built a record of disclosure in Ontario" and the fact that an exemption in the circumstances would appear to condone backdoor underwritings and would, in effect, amount to recognition of a Vancouver Stock Exchange listing as conferring reporting issuer status in Ontario.[270] Nevertheless, it stated that it would initiate discussions with the other Canadian securities administrators with a view to "expanding the basis" on which an issuer might qualify as reporting in the province.[271]

Within a few months the Commission, stating that "an important goal of securities regulators is to ensure that their system of securities regulation integrates with substantially similar systems . . . in other jurisdictions," granted a similar application by an Alberta corporation that had

been a reporting issuer in Alberta since February 1982.[272] It distinguished its earlier decision on the basis that the current applicant, Sorrel Resources, was also a reporting issuer in Ontario, although for too short a time to satisfy the resale period, and that the continuous disclosure obligations under the Alberta Securities Act are like those in Ontario, whereas British Columbia's are not because its statute does not contain a timely disclosure requirement.[273] It concluded, therefore, that an adequate disclosure record would exist in Ontario if Sorrel Resources filed the missing documents from its Alberta filings for the preceding year and suggested that it might seek legislative authority, like Alberta's, to enable it to accomplish the same result by directly declaring an issuer to have been "reporting" for purposes of the Act,[274] "a power which will facilitate the functioning of a national capital market in Canada."[275]

The distinctions are not altogether convincing. Although the British Columbia Act does not impose timely disclosure obligations on reporting companies, the Superintendant of Brokers has done so through the adoption of Uniform Act Policy 2-12 which requires public disclosure of the same information as the Alberta Act.[276] Moreover, the Consolidated Ascot application requested that the Ontario shareholders be permitted to sell only in British Columbia where a disclosure file did exist, as has been allowed in a number of other applications.[277] The determination not to follow this practice may have been influenced by the large percentage of Ontario shareholders and the percentage of the outstanding shares held by them.[278] The Ontario Commission has developed a series of guidelines which apply to resales of securities obtained in a rights offering and preclude an exemption from the legislative limitations on resale of securities of non-reporting issuers where Ontario residents constitute more than 5 percent of the security holders or hold more than that percentage of the outstanding securities in question.[279] In fact, even the Alberta Commission, which granted the exemption sought by Consolidated Ascot Petroleum and initially appeared rather less inclined toward this type of protective policy,[280] now appears to have accepted the Ontario approach.[281]

Nevertheless, this policy too might be questioned as an adequate basis for the *Consolidated Ascot* decision. Although it reflected regulatory apprehensions over backdoor distributions and was presumably premised in part on the likelihood of a trading market in the securities developing in Ontario, a number of applications which have been granted as coming within the specified percentages permit resales of securities by more Ontario residents than were affected by the *Consolidated Ascot* offering.[282] Indeed, in view of the ease with which local investors may go elsewhere to purchase securities about which they have information, as is demonstrated by the proceeding itself, the Commission's position would tend to encourage such investment in issuers traded in the United States rather than elsewhere in Canada[283] and in

addition, imposes on Ontario investors a burden not borne by other Canadians.[284]

The *Consolidated Ascot* and *Sorrel Resources* decisions may be viewed in several ways; they may be considered as representing the imposition of arbitrary barriers to interprovincial trading, as evidencing an attempt to coordinate similar legislation or, possibly, as the beginning of a movement toward greater coordination of the provincial regimes through the development of some sort of national reporting issuer status or criteria to determine it. Whatever significance is attributed to these decisions, they and the related policies respecting resales point up a major deficiency in the effectiveness of the closed system that will persist unless uniformity is achieved.

The prospectus requirements in the provincial acts, including resales by purchasers in exempt distributions, are premised on trading in the province by an issuer or a control person,[285] whether it involves a sale from the province to an extraprovincial purchaser[286] or a sale originating elsewhere to a local resident.[287] But the holding periods and limitations on resale, the core of the closed system, apply only to persons who acquire securities pursuant to an exemption under the relevant act; in other words, the Ontario Act controls resales only if an element of the original exempt transaction occurs in Ontario.[288] Therefore, a purchaser of securities in an exempt transaction in another province that has not enacted a closed system may resell the securities to public investors in Ontario free of the strictures in its statute.[289] Unless he controls the issuer, his sale is unregulated by his home province and by Ontario. Presumably such sales, aided by the efforts of six brokers, formed the background to the *Consolidated Ascot* application.[290] The Quebec Commission has attempted to address this issue through a policy statement which requires the filing of a notice for listed securities, and an information statement similar to a prospectus and subject to regulatory approval for unlisted securities, by any dealer who engages in solicitation in an effort to sell a substantial block of outstanding securities in circumstances where a prospectus is not required.[291] The policy thus applies to any substantial secondary sale and has serious implications for institutional investors, including those who have purchased securities of a reporting issuer and held them for the requisite period.[292] Even then it would probably not prevent the sales that necessitated the *Consolidated Ascot* application.[293] The "closed system" will necessarily have such gaps unless the acts adopting it prohibit all sales of securities of non-reporting issuers without a prospectus being filed or unless all of the provinces enact uniform closed system legislation.[294] At the moment, neither seems likely.

Jurisdictional Avoidance

The implementation of a singular policy by one province may invite unintended responses by those subject to it that may render it ineffective

unless further regulatory steps are taken to support it. Indeed, because businessmen invariably plan their affairs to accomplish their desired results within a given legislative framework, the statutory norms must constantly be adapted to address the new devices developed under an existing scheme; the process may be complicated by a federal system in which the laws of a province may not extend beyond its geographical boundaries. The blue sky standards governing rights offerings in Ontario, for example, may induce issuers to structure their offerings to comply with the Ontario Commission's policy and thus benefit some shareholders in all jurisdictions; or it may lead an issuer to make a rights offering to all but Ontario shareholders and thus deprive them of an opportunity to participate on the same basis as those in other provinces.[295] The Ontario policy attempts to preclude such potential avoidance by announcing that the Commission will object to a rights offering that excludes a substantial number of Ontario shareholders and will take "appropriate enforcement action against the issuer and its directors and officers."[296] But the types of enforcement action available to the Commission, such as a cease trading order prohibiting trading in the issuer's shares or preventing the issuer from raising capital in Ontario, would compound the harm to Ontario shareholders and extend it to the remaining ones as well.[297] And an order prohibiting its directors and officers from trading in Ontario would be effective only against those residing in the province.[298]

A similar policy has been announced by the Quebec Securities Commission with respect to distributions. The requirement in the Quebec Securities Act that a prospectus be in French imposes additional inconvenience and costs, and a number of issuers making otherwise national distributions have not filed a prospectus in Quebec,[299] but have instead sold securities to institutional investors in that province under the exemptions in the Securities Act. The Quebec Commission's response was to publish a notice declaring that such conduct, by excluding Quebec investors from participation in national issues, impedes the proper functioning of a national securities market and announcing its intention to deny the exemptions to any issuer attempting such a distribution and to prohibit all trading in its securities in the province.[300] The notice also suggests that a dealer selling securities under the exemptions would do a disservice to his client and hints at possible disciplinary action against a registrant who acts in such transactions.[301] Once again, the proposed sanctions would themselves erect further barriers to the national market the Commission is seeking to foster.

Experimentation with higher standards of issuer conduct in an individual province thus creates a risk of avoidance that may have a counterproductive impact on local investors and invite administrative attempts at enforcement which themselves further segment the market for an issuer's securities. The possibility of such escalation should not, however, prevent attempts to increase investor protection where a reg-

ulatory authority believes it warranted. Rather it suggests another type of factor that must be taken into consideration when weighing the merits of a peculiar policy against the consequences of adopting it and imposes a further tension between the policies of an individual commission and the demands of a national market. While there have been some dramatic instances, attempts by the provincial commissions to shore up their policies have not in all cases caused serious conflict. In fact, the substantive policies concerning rights offerings and national distributions have in recent years largely managed to avoid it.

Substantive Regulation

Takeover Bids

Takeover bids have been a consistent subject of regulatory attention during the past 20 years.[302] Because they enable an offeror to acquire control of a corporation without the agreement of its directors, through a direct appeal designed to induce shareholders to sell their shares, they usually involve a short but intense campaign of solicitations and are frequently vigorously opposed. Indeed, takeover bids have become a symbol of modern corporate warfare, and the legislation enacted to regulate their conduct has generally attempted to ensure that the shareholders are not the victims by providing them with disclosure,[303] minimum periods in which to consider a bid, withdrawal rights during an initial period in case they are stampeded into early acceptance, and maximum periods beyond which an offeror cannot hold their shares without becoming bound to purchase them.[304] The statutes also impose limits on an offeror's flexibility by defining the nature of the conditions that an offeror may include as prerequisites to its being obligated to purchase shares deposited by offerees,[305] precluding differential treatment of shareholders, for example, with respect to the price offered,[306] and prohibiting conduct by an offeror that is inconsistent with these requirements.[307] In order to avoid a procrustean regimen which might itself become unduly restrictive as a result of tactical devices adopted in a particular bid, the statutes authorize the granting of exemptions, often explicitly adverting to the temporal and disclosure requirements that would otherwise apply.[308]

As is already clear, the takeover bid provisions in the provincial securities acts and the Canada Business Corporations Act are anything but uniform.[309] Since their enactment in Ontario following the *Kimber Report*, there have been constant changes in almost all jurisdictions in response to the devices adopted by bidders and changing attitudes concerning corporate morality.[310] The new "uniform act" enacted in Ontario in 1978 began a new round of innovation and the regulatory extensions resulting from it are now beginning to find their way into legislation in some provinces, again without consistency of detail.[311]

The statutory developments have been accompanied by alterations to the rules of the self-regulatory organizations designed to reflect the same policies in the governance of "stock exchange takeover bids."[312] Indeed, the regulation of takeover bids has presented possibly the most dynamic area of legislative and administrative change with the result that the current provincial provisions contain a substantial number of differences with respect to the timing of bids, the terms of offers and even the philosophical premises.[313]

The interjurisdictional issues relating to takeover bids are substantial and create problems not unlike those associated with prospectus clearance, because of the short period during which a bid is made, but exacerbated by the specificity of the regulatory requirements.[314] The Canadian administrators, provincial and federal, have attempted to coordinate the provisions of their statutes through the types of cooperative effort already described. They have met to develop consistent policies,[315] have held joint hearings during the course of a bid[316] and made exempting orders to remove inconsistent time periods and other requirements in different provinces[317] and to enable bids to be made through a stock exchange outside their province or otherwise to permit coordination with extraprovincial requirements.[318] The Ontario Commission has on occasion deferred to a regulatory body elsewhere with direct authority over the terms of a bid,[319] and in one instance took no action to prevent an offeror from excluding Ontario shareholders from its bid after the Commission refused to grant it an exemption.[320] The four leading administrators, however, have since indicated their intention to consider issuing cease trading orders in tandem where an offeror so discriminates, even if the bid complies with the requirements of their province.[321] The latter approach provides a new cooperative exercise with respect to avoidance of particular jurisdictions.

Takeover bids, however, more than any other type of transaction, have strained the territorial limits within which provincial legislatures and their administrative creations must abide. In a number of instances offerors who were unwilling to accept the constraints imposed by a province on the potential success of their bid have, instead of excluding shareholders in that province, accomplished their goal by going elsewhere to purchase the shares in a manner not permissible in the province, in each case provoking a provincial response involving the extraterritorial application of its laws. In 1978 Alberta Gas Trunk Line Company preempted two publicly announced takeover bids for the shares of Husky Oil Limited by purchasing over a third of Husky Oil's outstanding shares through a stock exchange in the United States on which they were listed.[322] Nevertheless, the Ontario Securities Commission characterized the purchases as subject to its jurisdiction, but within a statutory exemption for stock exchange transactions, and published a draft regulation intended to preclude such acquisitions premised on the con-

clusion that "an offer made through a stock exchange outside Ontario is made to security holders resident in Ontario."[323] Subsequently, but before the regulation was adopted, Edper Equities Ltd., after having been refused an exemption by the Ontario Commission for a bid in the province, acquired control of Brascan Ltd. by the same means.[324] Within two weeks the regulation was adopted by the Ontario cabinet.[325] The Commission is of the view that the current Ontario Act accomplishes the same result[326] and it has attempted to apply it in an action now before the courts to require Electra Investments (Canada) Limited to comply with the Ontario Act by making a takeover bid for the shares of Energy & Precious Metals Inc. at the highest price it paid for them in purchases made through the Montreal Exchange.[327] As the four leading exchanges in Canada have substantially similar rules governing takeover bids made through their facilities, and all but the Vancouver Exchange have been generally recognized for purposes of the statutory exemption for such bids,[328] a contravention of any of their rules would result in an illegal takeover bid having been made in at least three provinces, if the Commission's position is accepted, and the same would be true of purchases on any other exchange that raise the purchaser's holdings above the percentage in the statutory definition of takeover bid if there are shareholders of the same issuer in the province.[329] But the commissions have not yet, apparently, turned their attention to devising *de minimis* exemptions for such cases.[330] It may be unnecessary to do so if the court in *Electra* agrees that the Commission's interpretation involves an unconstitutional extension of Ontario's rules beyond its borders.[331] If so, such purchases present an issue that cannot be resolved through provincial cooperation.[332]

Follow-Up Offers

Perhaps the most dramatic and certainly the most controversial example of the extraterritorial application of its securities act by a provincial commission is that of Ontario's "follow up offer" requirement. Although the legislation originally enacted in Canada to regulate takeover bids excluded from its coverage acquisitions of control through purchase of a block of shares from a single shareholder or a small group,[333] the Ontario Securities Commission, after some fluctuation in its views, concluded that such purchases should not be permitted, and the 1978 Act incorporated a compromise position that has become known as the "follow up offer" obligation.[334] In brief, the Act requires a person who purchases sufficient voting securities of an issuer to raise his holdings over 20 percent of those outstanding, the percentage in the definition of "takeover bid," and pays a premium of more than 15 percent above the average closing price of the security during the ten days preceding the purchase to make a takeover bid at the purchase price within 180 days of

the purchase for all of the securities of the same class held by the remaining shareholders.[335] Because of a recognition of the territorial limits on provincial legislative jurisdiction and because takeover bids are defined in terms of offers to Ontario shareholders,[336] the scheme adopted in the Act was fashioned in the expectation that other provinces would enact similar legislation and create a national regime so that the requirement could not be avoided by making a purchase outside of the province.[337] Accordingly, a purchaser of control must make a follow up offer not only to residents of Ontario, but also to shareholders in "uniform act provinces," that is, all other provinces specified in the regulations as having substantially the same follow up obligation,[338] and if he fails to do so, all such shareholders may bring an action for the value of the offer and damages.[339] However, no other province followed up on Ontario's lead; Alberta rejected the limitation on control sales[340] and Quebec ultimately attempted to achieve the same result by requiring a general takeover bid to be made in circumstances where the Ontario Act requires a subsequent offer.[341]

The Ontario Securities Commission was, therefore, compelled to address the possibility that the application of its new statutory obligation would be haphazard or that it might be rendered ineffective by relatively simple arrangements to ensure that the purchase occur outside the province or that the seller not have an Ontario address.[342] The result was a number of regulatory devices to extend the application of the Act to otherwise extraprovincial dealings. At its first opportunity the Commission developed a "linked bid" or integration concept to hold a purchase of shares in a federal corporation with its head office in Alberta by an Alberta corporation from a Maryland corporation with its head office in Delaware in a private transaction in the United States to be subject to the Ontario follow up provision.[343] The Commission based its conclusion on the fact that the Alberta corporation, Atco Ltd., had purchased shares of the Maryland corporation, IU International Limited, in a takeover bid for which an exemption had been obtained in Ontario[344] in order to sell them to IU in exchange for the controlling shares of Canadian Utilities, the federal corporation. As the purpose of the takeover bid for the IU shares was to acquire the consideration for the subsequent acquisition of control of Canadian Utilities, the Commission treated the two transactions as one so that the later purchase too was subject to the Act.[345] Because of the conceptual basis of its holding and the fact that it granted an exemption from the follow up requirement, this decision did not acquire the notoriety that it probably deserved.[346]

The major method of protecting the integrity of the legislative scheme was through the use by the Commission of its enforcement powers. In several instances the Commission invoked its authority to issue a cease trading order and to deny the exemptions from registration to corporations who purchased shares in an Ontario reporting issuer in transac-

tions that had no connection with the province, and to deny the exemptions from registration to individual directors and officers who participated, in order to compel the purchaser to make a follow up offer. The two most prominent examples, perhaps, involved a purchase in Alberta of control of one Alberta corporation by another, despite Alberta's rejection of the requirement, because the former's shares were listed on the Toronto Stock Exchange and a purchase in Quebec by a Quebec crown corporation of shares in a similarly listed reporting issuer.[347] The Commission's attempts to require a follow up offer with respect to Ontario reporting issuers regardless of the locus of the control purchase were widely criticized[348] and, under a new chairman, it appeared to resile from its aggressive stance. In a decision early in 1983 adopting a "strict construction" of the statute, it declared that a purchase from a person who is not an Ontario resident is not a takeover bid.[349] This more moderate stance was confirmed in public speeches by the chairman;[350] and the proposed amendments to the Ontario Act, following the recommendations of both the industry and practitioners reports and discussions among the administrators,[351] would remove the follow up obligation and replace it with the approach in the Quebec Act.[352]

If the above were a complete rendition of the follow up offer experience, the Commission's extraterritorial attempts to secure its vision of market integrity might be viewed as a passing aberration which has been rectified through the cooperative efforts of the securities industry and the provincial administrators. But it is not. In its *Humboldt Energy* decision the Ontario Commission, while adopting a position of restraint with respect to the interpretation of the Securities Act, reasserted its readiness to utilize its enforcement powers if a transaction is abusive to minority shareholders or has "a negative impact" on the capital market.[353] The potential for continued extraterritorial application of Ontario "law" thus remains even where a statutory takeover bid is not made, and there is little doubt that the Commission will exercise it.[354] In fact, it has done so already; in a recent decision it imposed sanctions on Universal Explorations Ltd. for a failure to fulfill the follow up offer obligation by paying minority shareholders a price equivalent to that paid in the transaction in Alberta that formed the basis of its earlier orders.[355] The decision rests on an assertion that Universal had an "obligation" to make an equivalent offer as a result of a statement in a press release that it would do so.[356] This novel theory of obligation, combined with the issuer's failure to discuss its plans with the Ontario Commission or to disclose the outstanding Commission orders in its information circular, led the Commission to conclude that there "may well have been a negative impact on the capital markets in Ontario" sufficient to warrant the application of its process.[357] Its decision goes at least as far as those of its predecessor, and its new conceptual premise may extend further.[358]

The follow up offer provides a striking illustration of the difficulties of effectively implementing a policy in only one province and of the consequences for cooperation of the steps necessary to try to enforce it. If anything, it reinforces the conclusion of the Securities Industry Committee and others that uniformity is essential if such requirements are to be effective.[359] If so, there appears to be little basis for optimism about the effective regulation of such transactions by the provinces, as even the past chairman of the Ontario Commission has now concluded.[360] In fact, the contrary seems to be the case. The provincial administrators are currently considering a policy to regulate defensive tactics in takeover bids, in particular, defensive share issues. While one administrator has recognized that effective regulation of such conduct would require a national policy,[361] several administrators have apparently accepted an approach based on minimal contacts with a province[362] and the Ontario Commission has indicated its inclination to take a more active approach and issue cease trading orders "regardless of the target company's jurisdiction of incorporation."[363] *Plus ça change. . . .*[364]

Enforcement

As the provincial commissions regulate a national market in an increasingly international context under authority that is limited territorially, cooperation with each other and with their foreign counterparts is essential to the success of their efforts, particularly with respect to enforcement of their laws.[365] This fact was accorded legislative recognition in the initial uniform legislation which authorized a local judge or magistrate to endorse a warrant issued in another province for the arrest of a person charged with violating a provision of its securities act.[366] And it provided the reasons for the annual meetings of the Canadian Securities Administrators and for the increase in their frequency in the early 1960s.[367] But neither of these responses is indicative of the degree of administrative cooperation that must necessarily occur with respect to detection, apprehension and deterrence of violators through personal contacts between the administrators and their staffs and that does not become public. Without such contacts the otherwise ample powers of investigation in the provincial acts would frequently be rendered ineffective and it would be surprising indeed if the provincial administrators do not assist each other in such matters.[368] In fact they do.[369] The provincial commissions, for example, exchange information with each other[370] and when the situation so required, have coordinated the exercise of their powers to freeze the assets of a person to ensure that they are available for public investors.[371] Similarly the commissions will deny or cancel a person's registration as a dealer or salesman for a violation of the securities laws of another province or country.[372]

As is by now apparent, the most common method of enforcement is an order preventing trading whether through a refusal to accept a prospectus, a cease trading order or an order denying the use of the exemptions from the registration requirement and thus precluding any trading in the province by its subject.[373] All three types of order have been applied to interjurisdictional failures to comply with the securities laws. In fact, compliance with the continuous disclosure obligations by extraprovincial issuers was initially premised on the ability of a commission to deny access to local investors by not approving a prospectus[374] and the same approach has been adopted with respect to an issuer that does not reveal the identity of its controlling shareholders or the insiders of which have failed to comply with insider reporting requirements.[375] Such orders may, however, be harmful to local investors.[376] As a cease trading order may have similar dislocative effects, especially if it is imposed in only one province,[377] the provincial administrators may issue them contemporaneously with respect to a common problem,[378] and the Ontario Commission has articulated the practice in a formal policy announcing its intention to issue a cease trading order whenever one is issued in another province because of a failure to comply with disclosure requirements.[379]

Although a cease trading order may be used to protect investors in circumstances where it has extraterritorial effects, for example, by prohibiting all trading by local investors whether in or out of the province,[380] the most controversial use of the statutory enforcement tools has involved the application of such orders and of orders denying the exemptions for conduct outside the province in an attempt to enforce compliance with a requirement that is peculiar to it.[381] This practice was initiated and has been used almost exclusively by the Ontario Securities Commission. In 1976 the Commission convened a hearing to consider denying the exemptions to five directors of National Sea Products Limited, a reporting issuer in Ontario because of a Toronto Stock Exchange listing, for their failure to have the corporation issue a press release announcing a material change in its fortunes as required by the uniform timely disclosure policy and for trading on their own behalf prior to the disclosure of the information.[382] The trades occurred in Nova Scotia and through the facilities of the Montreal Stock Exchange, but not in Ontario. The failure to make disclosure was more difficult to locate, for as nothing happened, it could be characterized as having occurred nowhere, in Nova Scotia where the directors were or everywhere an obligation to disclose was not fulfilled. Yet while it found that its policy had been breached and that one insider had traded improperly, the Commission did not address the question of jurisdiction; it simply assumed it and proceeded to the merits. Nevertheless, the Commission was criticized for applying its policy to a situation "where no relevant event occurred within Ontario" and the decision was taken as establishing the availability of such orders for conduct outside the province.[383]

In a subsequent decision involving alleged insider trading in British Columbia in shares of a British Columbia corporation with a listing on the Toronto Stock Exchange, the Commission justified the use of its power to deny exemptions in such cases as necessary to protect the "credibility of the capital market" by ensuring that persons who have demonstrated a propensity to impropriety not be permitted to trade.[384] Indeed, it characterized such orders as "an assertion . . . of its jurisdiction and responsibility to determine the sorts of activity which should disentitle persons from trading" in securities in the province and denied that any extraterritorial application of the Ontario Act was involved.[385] It has been suggested that the real reason for utilizing such orders is the Commission's inability to enforce the provisions of the statute against persons who are not in the province and that they are therefore premised on a desire to trade in Ontario at some future time.[386] Their effectiveness more likely derives, however, from the psychological impact of the proceeding and order than from any economic consequences related to trading in Ontario. Whatever the characterization of such orders, it is undeniable that they are based on conduct occurring outside the province which is judged by Ontario standards. If their justification lies in the need to protect the integrity of Ontario's securities market, it may be appropriate to limit their use to issuers that assume an obligation to comply with the Act's and the Commission's requirements by becoming reporting issuers in the province and to conduct that, like insider trading and manipulation, is prohibited because of its associations with fraud in virtually all jurisdictions with modern securities markets and to refrain from using them to force compliance with local standards that are not generally accepted elsewhere.[387] Thus decisions to invoke the enforcement process too require a balance between local policy goals and federal values in order to provide necessary protection to investors without inviting consequences that may in the longer term be counterproductive.

The Ontario Commission's proceedings against the Caisse de dépôt provide an interesting, if anomalous, example of the possible effects of an activist stance on enforcement. The Caisse had consistently failed to file insider trading reports in any province, despite its large holdings in a number of reporting issuers, in reliance on its status as an agent of the Crown in right of Quebec. As a result the Director of the Commission initially refused to accept a prospectus of a corporation in which the Caisse was an insider, but relented on the basis of a declaration by the responsible Quebec minister that the then proposed Quebec Securities Act would treat the Caisse like all other participants in the securities market.[388] Nevertheless, the Commission denied the Caisse's trading exemptions because of its continued failure to comply with the insider reporting requirements of the Ontario Act and because of an alleged improper takeover bid by it through purchases in Quebec.[389] The orders, while arguably not extraterritorial,[390] struck a responsive chord by focussing attention on the fact that the doctrine of Crown immunity from

legislation is no longer appropriate in the context of the securities market as a result of the direct participation of governments and their instrumentalities in business affairs and led to amendments to the Quebec Act and a bill to amend the Ontario legislation.[391] In view of the proposed Ontario amendments the Caisse has, for the moment at least, agreed to comply with the Ontario statute.[392]

While the Commission's position thus appears to have been vindicated on the merits, the results themselves suggest that effective cooperation cannot be coerced. The provision of the Quebec Act that resulted from the Ontario proceedings deals with only one of the issues that precipitated them. It requires governments and their agents to file insider reports after they acquire a 10 percent holding in a reporting issuer; and even then it does not treat them like other insiders, for the reporting periods permit substantially longer delays.[393] The Ontario Bill, on the other hand, would generally subject the Crown and its agents to the duties imposed by the Securities Act, but excepts them from the application of all of its liability provisions.[394] And while the agents of other provinces appear to be voluntarily complying with all relevant securities laws,[395] no other province has indicated an intention similarly to amend its act. As the matter relates as much to the broader issues associated with Crown immunity as to the securities market, it is not surprising that a uniform solution has not been achieved. Nevertheless, one may be imposed if the Ontario bill is enacted, for Crown agents would then be in the same position as national issuers.

Perhaps the major deficiency of the provincial securities acts is their failure to provide remedies for investors who suffer harm as a result of conduct affecting the trading market.[396] The extension of statutory prospectus liability to all documents incorporated in a short form prospectus under the prompt offering system has led two provincial commissions to address this question, but they appear to be acting individually.[397] Civil liability for market conduct, however, necessarily has interjurisdictional implications. A misrepresentation in a press release will affect the price of an interlisted security wherever it is traded so that an investor purchasing through the Alberta Stock Exchange may incur damage of the same degree as one on the Montreal Exchange, whether the issuer made the incorrect disclosure in Montreal, Toronto, Vancouver or New York.[398] While the definition of civil remedies might ordinarily be left to individual resolution in each province as under the current legislation,[399] a failure to coordinate statutory requirements dealing with market conduct might undermine the scheme adopted by one province or even several.

Although substantial differences now exist between the civil remedies in the provincial acts with respect to possible defendants and burdens of proof, the transactions which may provide the basis of an action are limited by some form of "privity" requirement which necessarily

imposes an upper limit on the liability that may be incurred by any defendant and helps to locate an action in a particular province.[400] An inaccurate press release or other continuous disclosure document, however, presents no such obvious basis for limiting liability; if the price of a security is affected by the statements, every person who trades on the wrong side of the misrepresentation is harmed, regardless of whether the issuer on whose behalf it was made is in the market at the time.[401] A province enacting a remedy for such investors may therefore wish to ensure that the issuer's potential liability remains within reasonable bounds and may establish a maximum amount of damages, a formula to determine them or a period during which a cause of action may arise for that purpose.[402] A different approach to any of these devices by one province or a failure to specify a ceiling in any manner could effectively override the policies adopted by others.[403] In fact, if a cap is to be placed on damages recoverable for certain types of market conduct, it may be necessary to devise a method for interprovincial coordination of actions as well.[404] The development of civil remedies for continuous disclosure documents, therefore, while important for the achievement of adequate investor protection, presents difficulties that require a cooperative solution at least with respect to the definition of remedies and possibly also with respect to the method of their enforcement. If any such efforts are to succeed, they may therefore have to extend beyond the Canadian Securities Administrators.[405]

Registration

All of the provinces and the territories, despite differences in legislative approach, require a person who carries on a business of trading in securities or advising with respect to them to be registered.[406] A securities firm that conducts its activities nationwide must therefore register separately in each of the 12 jurisdictions.[407] Although multiple registration requirements necessarily impose delays and inconvenience, at least at the time of an initial registration, they are unlikely to create serious impediments to registrants. The process is complicated, however, by the fact that most of the provincial securities acts contain residence requirements which authorize the administrator to refuse registration of an individual who has not lived in the province for the preceding year and is not about to move there or of a firm all of whose directors and officers are not in the same position.[408] Although the statutes appear to assume that residence will be treated as mandatory, the provisions in terms merely confer a discretion to deny a licence, and the commissions have for some time tended to waive the requirement with respect to national firms so long as the local branch manager resides in the province.[409] Indeed, this practice is reinforced by the use of a uniform application form adopted by all of the Canadian administrators

and the self-regulatory organizations for individuals whether salesmen, directors or officers.[410]

As the residence requirements were likely intended to facilitate supervision of registrants and enforcement of the legislative requirements, the increasing levels of cooperation between the provincial administrators have permitted a concomitant reduction in the rigidity of their application. The administrators have not only accepted a uniform form; they have adopted national policies applicable to registrants, including one directed at national firms with a view to supervision of their local offices,[411] and have tended toward the adoption of common educational standards and rules of conduct, the former facilitated by the courses made available through the Canadian Securities Institute.[412] Indeed, there is now a general recognition of the desirability of such uniform requirements[413] and an increased willingness on the part of the administrators to rely on each other's efforts with respect to the qualification and conduct of registrants.[414]

The resultant inroads on the residence requirements, although still the exception, represent a conscious attempt to facilitate the conduct of interprovincial business in recognition of the character of the market and the firms operating in it, while ensuring compliance with the standards for continued registration. The most straightforward are those relating to salesmen. At least five provinces permit salesmen residing near their borders to register in the province so long as their employer is a registrant and the trades in the province are subject to supervision by the local branch.[415] Three of these provinces have policies permitting salesmen residing anywhere in Canada to be registered on the same conditions in reliance on supervision and enforcement in their home jurisdiction.[416] The policies in British Columbia and Ontario are the result of an unsuccessful attempt to develop a scheme for national registration of non-resident dealers and salesmen, after which the two provinces proceeded alone.[417]

The Ontario Commission itself has gone further than most in waiving the residence requirements, frequently emphasizing reciprocity of treatment by other administrators.[418] It has, for example, permitted non-resident underwriters registered in another province to act as agents of an extraprovincial issuer in connection with a distribution and to sign the prospectus as such, provided that the securities are actually sold through Ontario registrants. But in doing so it has emphasized that such an exemption will be granted only once, presumably on the basis that a single distribution is not sufficient to constitute the establishment of a business in the province.[419] The Alberta Commission may be prepared to go further, for a similar exemption granted by it did not include the qualification.[420]

The treatment of non-resident advisers, however, represents the most significant exercise in interprovincial cooperation with respect to regis-

tration. The provincial administrators have recently adopted a common approach to such matters reflected in a decision of the Ontario Commission emphasizing the reciprocal understandings, which granted registration to an adviser even though it had no office in the province, subject to a series of conditions.[421] The adviser's dealings in Ontario are limited to institutional accounts but it can not hold any of their funds or assets; such funds are to be deposited with a financial institution registered and with an office in Ontario, and the adviser must make quarterly reports to the Commission on a confidential basis of the amount of assets in the province concerning which it acts as an adviser. The adviser's officers are required to maintain their registrations in British Columbia or Ontario and its controlling shareholder is to be similarly registered. And it had to establish a local attorney for service and attorn to the jurisdiction of the province, as did its controlling shareholder.[422]

The conditions thus reflect a balance between protection of local investors and reliance on another provincial administrator that accomplishes the aims of administrative cooperation in exemplary fashion. While acceptance of an extraprovincial registration with respect to the qualifications of advisers is not a difficult step in view of the nature of the services they provide and the fact that they are not permitted to hold assets in the province, it is less than clear that similar treatment cannot be accorded salesmen registered in another province as the Ontario and British Columbia administrators proposed. Cooperation between administrators has thus resulted in useful advances with respect to registration of market professionals, but it could go still further toward the removal of artificial encumbrances to the national market.[423]

Although the mechanical aspects of registration and the relationships between registrants and their clients have proved fertile grounds for coordination of process and policy, broader structural issues affecting the securities industry more generally have not. In 1970 a report of a joint securities industry committee struck in response to the "acquisition of a long-established Canadian investment dealer" by Merrill Lynch, Pierce, Fenner & Smith a year earlier recommended that conditions be imposed on all registrants to limit foreign ownership of Canadian securities firms and to preclude their "going public" to seek additional capital.[424] The industry report initiated a public debate on these issues that has not yet been finally resolved, but instead has been expanded to include questions concerning the ownership of securities firms by other financial institutions,[425] diversification of the activities of securities firms,[426] registration of other financial intermediaries such as banks and loan, trust and insurance corporations to perform dealer and brokerage functions,[427] and the availability of the exemptions from registration, which are generally parallel to those from prospectus filing,[428] to persons who would not be entitled to obtain registration because of their foreign ownership or institutional character.[429] And not surprisingly, there has

been a spate of hearings, studies and reports in the 15 years since the purchase of Royal Securities.[430] In brief, the issues currently being addressed by the provincial administrators under their jurisdiction to impose conditions on registration relate to the securities activities of all financial intermediaries and have potentially serious implications for the structure of the securities industry and even for the market itself.

The treatment of these issues by the provinces has on the whole reflected two dominant and opposing approaches traditionally adopted by Ontario and Quebec while the other provinces have, for the most part, participated in the policymaking process but refrained from active decision making.[431] As a result the more restrictive approach of Ontario has dominated with respect to the national firms and its customary coincidence with the position of the industry's self-regulatory organizations has tended to ensure its application to those remaining, except in the few instances of reversal by the Ontario or Quebec Commission.[432] The Ontario Securities Commission and the Ontario government accepted the position of the industry committee and regulations were promulgated limiting foreign ownership of Ontario registrants to a maximum of 25 percent with no more than 10 to be held by any single investor,[433] but during the same period a committee established by the Quebec government to study the industry report recommended against such limitations, preferring instead requirements that would ensure a minimum proportion of local ownership of firms registered in the province.[434] Quebec has consistently adhered to the recommendations of the Bouchard Committee on foreign ownership by reversing decisions of the Montreal Exchange that attempted to exclude foreign firms from membership[435] and by prohibiting any such restrictions with respect to public securities firms,[436] and has focussed on supervision of the controlling persons in accordance with the standards applicable to all registrants.[437] The policy in the Ontario regulations designed to protect the industry by treating it as a key sector has held firm, and has been followed in Saskatchewan as a matter of commission policy,[438] despite indications by Ontario's three most recent chairmen that reconsideration is warranted.[439] In fact, although an attempt to convene a commission hearing on the issue in 1982 appears to have been squelched,[440] it is likely to arise again in forthcoming hearings by the Ontario Commission on exempt trading by so-called "suitcase brokers."[441]

The Ontario and Quebec positions do not diverge dramatically with respect to public ownership of securities firms, despite the fact that the initial recommendations in each province did.[442] In 1981, following yet another industry report, the Ontario Securities Commission convened a hearing to which it invited the other Canadian administrators to consider a Toronto Stock Exchange by-law based on the report.[443] The announcement of the by-law's approval stated that the result represented a consensus among four administrators[444] and two of them, Ontario and

Quebec, implemented it; both require commission and self-regulatory approval of any public investor who becomes an insider of a firm and of directors who are not registrants (or members of the firm) and both specify that at least 40 percent of a firm's board of directors must be firm members,[445] thus ensuring its continued professionalism.[446] There is, however, a difference in application, for the Ontario Policy suggests that approval of a holding greater than 10 percent will be the exception, whereas the Quebec Commission has modified its policy and will not object to an investor unless there is reason to conclude that he is lacking in integrity or that the acquisition is otherwise contrary to the public interest, and it has removed the Montreal Exchange's power to do so.[447]

Once securities firms may go public, it becomes necessary to determine whether any further limits on ownership by special types of investors should be imposed; and this question invariably leads to its obverse, whether any type of investment should be impermissible for registrants.[448] On these issues, institutional ownership of securities firms and diversification by them into other financial areas, there are major differences of policy between Ontario and Quebec. Following the public ownership hearings each announced its intention to address them and after holding separate hearings reached opposite conclusions.[449] The Ontario Commission, emphasizing the concept that each of the various financial institutions operating in Canada has a "core function" to perform, concluded that financial institutions should not be permitted to invest in securities firms and that securities firms should likewise be precluded from investment in them; a minority would have permitted institutional holdings of up to 10 percent in securities firms, as with foreign investors, and a similar level of investment by securities firms in loan or insurance corporations.[450] Its Quebec counterpart went substantially further than even the minority and now permits financial institutions to hold any number of shares in a securities firm, subject to its consent, like any other investor and imposes similar conditions on the registration of a controlled registrant to ensure its independence and thus its continued adherence to the standards applicable to such firms.[451] A Quebec registrant may also engage in other businesses provided that it obtains the Commission's approval and structures its affairs so that the non-securities aspects are conducted on an independent basis.[452] These issues too, despite its insistence on the "four pillars" concept, must be reconsidered by the Ontario Commission in its forthcoming hearings on exempt trading.[453]

Perhaps the most significant implications of these developments relate to the changing character of financial institutions and to the increasing movement of their core functions into the penumbra of the proverbial "financial supermarket." Whereas the Ontario Securities Commission accepted the segregation of the activities of banks, loan and trust corporations, insurance corporations and securities firms as a basic premise of

its decision to prohibit institutional ownership and diversification of the latter,[454] the current Quebec policy necessarily rejects any remnant of the four pillars concept. Indeed it explicitly authorizes a financial institution to enter the securities business through a subsidiary which fulfills the conditions applicable to controlled registrants.[455] Although the relationship between mutual fund and insurance salesmen gave rise to similar issues some years ago,[456] questions relating to the blurring of traditional institutional roles have been raised most consistently in recent years by the activities of banks with respect to participation in the underwriting of corporate securities and to other financial services.[457]

The recent registration of a bank as a discount broker in Ontario and the proceedings relating to it provide an interesting example of the approach of the provincial administrators to these issues. In response to a proposal by the Toronto Dominion Bank to initiate a discount brokerage service to enable investors to take advantage of the abolition of the Toronto Stock Exchange's fixed commission rate structure the Ontario Securities Commission convened a hearing to consider the broader issues of such institutional involvement in brokerage services to which it invited the other administrators.[458] Although five attended the first week of the hearing, they were not all present for the remaining 17 days.[459] The Commission report that resulted ratified the core functions approach accepted in its decision concerning institutional ownership, identified the securities industry's "pillar" as underwriting, concluded that discount brokerage services should be permissible for banks and presumably other financial intermediaries as they do not undermine the industry's foundational function, and proposed the creation of a new category of registrant for the purpose.[460] The report stressed the "importance throughout Canada of the issue" and the Commission's concern with the stance of other provinces, and the Commission presented it for discussion at a meeting of the Canadian Securities Administrators a few weeks later "with a view to further developing a comprehensive and coherent approach to securities regulation throughout Canada."[461] The Quebec representatives apparently did not participate in the discussions and the others, while accepting that "underwriting and brokerage functions . . . are to be preserved exclusively for the investment industry," reserved their opinion on the Ontario recommendations and the Bank's application in their provinces.[462] Nevertheless, the Ontario Commission proceeded alone to define guidelines and conditions of registration for a new classification of "order execution access dealer"[463] and the Toronto Dominion's "Green Line Investor Service" was granted registration in Ontario.[464]

The only other province expressly to address discount brokerage has been Quebec. In fact, the Quebec Commission's abstention from the review of the Ontario report at the administrators' meeting in November 1983 may have been a consequence of its having previously determined

its policy on the issue inconsistently with the Ontario recommendations.[465] A bank or other financial institution may carry on a discount brokerage business in Quebec through a registered subsidiary which can avail itself of the general exemption granted by the Commission from the suitability elements of the "know your client" requirements to facilitate the activities of discount brokers.[466] Unless it does so, however, an institution can engage in such business only pursuant to a statutory exemption which prohibits solicitation, and the Commission interprets the limitation strictly to include any promotional efforts including making brochures available in bank branches.[467] Thus while the registration regime in Quebec is generally more liberal than Ontario's with respect to financial institutions, it may be more restrictive for discount brokerage services offered by banks.

The treatment of discount brokerage highlights the fact that the provincial securities administrators have hardly begun to address on a cooperative basis the issues raised by the expansion of financial institutions into non-traditional areas of business for the regulation of the securities industry. Nor can they do so through their own efforts. The Ontario Commission acknowledged this fact both in its report and in the notice concerning its current review of exempt trading[468] and the Alberta Commission, having encountered investigative obstacles because of different regulatory schemes, has recommended that the Alberta government consider the creation of a single agency to regulate all financial institutions and investment activities.[469] Indeed the regulatory structure governing the activities of financial intermediaries is the subject of current provincial and federal studies[470] and is in the process of active reform in Quebec.[471] The multi-regulatory context necessarily compounds the difficulties of a coordinated interjurisdictional resolution of these issues. It is fair to say that it may be beyond the capacity of the provincial securities administrators, cooperatively or otherwise.[472]

Stock Exchanges

Modern stock exchanges combine regulatory functions and entrepreneurial activity, usually under the supervision of some form of governmental authority.[473] Needless to say, the Canadian exchanges reflect this duality; they establish rules to govern the qualifications and conduct of their members and listed corporations[474] and the manner of trading through their facilities[475] while endeavouring to increase their levels of trading and thus the business of their members. An exchange may, for example, provide services to publish trading information nationwide as an exclusively entrepreneurial venture;[476] in some instances, like the adoption of a regime for public offerings of shares of junior issuers[477] or the creation of option and futures trading markets and the development

of new trading instruments for them, a similar aim may dominate although regulatory elements are necessary for its implementation;[478] and on occasion, as with the acceptance and regulation of "stock exchange takeover bids," the two goals may coalesce.[479] As might be expected, these self-regulatory efforts often address common problems requiring cooperative resolution and also result from competition between the various exchanges. The exchanges have cooperated, for example, in the development of uniform rules to regulate stock exchange takeover bids, in the adoption of their commission rate structures and in devising policies through joint industry committees.[480] On the other hand, individual initiatives like the Toronto Stock Exchange's recent policy on distributions by mining and junior industrial corporations might be viewed as a product of competition.[481] And the development of facilities and instruments for trading in options and futures provides both an example of the historical rivalry between the Montreal and Toronto Exchanges and a recognition of the benefits of cooperation.[482]

The approach to implementing a particular innovation reflects not only the desires of the exchanges for increased prestige and business, but also their frequently divergent regulatory philosophies, their relationship with the provincial commissions and the operations of the Canadian securities market. Whether they act individually or cooperatively, they invariably do so with a view to the national and international character of the market and the provincial regulatory context, on occasion dealing with the Canadian administrators in a posture not unlike an issuer with shareholders throughout the country.[483] In fact, although each of the Canadian exchanges is incorporated by a special act of the legislature of the province in which it is located,[484] it has become increasingly evident in view of the nationwide impact of their rules and activities that the exchanges are more than merely provincial institutions.[485] As a result, the traditional form of local regulation, by the administrator in their province, has begun to show signs of stress with respect both to the ability of the exchanges to conduct their business and to that of the administrators to regulate it.[486] Indeed, as with other aspects of provincial securities regulation, the administrators have not developed a coherent system for the cooperative resolution of self-regulatory matters but have tended to address them on an ad hoc basis frequently varying with the policy predilections of a current administrator to the specific issue in question.

Until the 1970s virtually no efforts were made to achieve a cooperative approach to the regulation of the stock exchanges in Canada.[487] On the few occasions when an administrator's attention focussed on inter-jurisdictional aspects of exchange trading the result was anything but cooperation. In 1959, for example, the Ontario Commission withdrew its exemption for securities listed on all stock exchanges but Toronto's because of a lack of reciprocal recognition of the Ontario exchange by

other provinces.[488] Ten years later the Quebec Securities Commission penalized a member of the Toronto Stock Exchange for failing to comply with a policy, adopted by it to reinforce trading in Quebec, requiring registrants to fill orders received in the province through a local exchange; the firm, a member of exchanges in both Ontario and Quebec, had placed an order through the Toronto Exchange where a better price was available.[489] As a retaliatory measure the Toronto Stock Exchange, without interference from the Ontario Securities Commission, amended its rules to prohibit arbitrage transactions with the Montreal exchanges, an action which "served to some extent to balkanize the Canadian market."[490] The limitation on interprovincial trading remained for almost a decade; in 1977 the Quebec Securities Commission, recognizing the potential for an integrated national trading market, repealed its policy and a year later the Montreal and Toronto Exchanges reached agreement on removal of the "anti-freighting" rules.[491] The administrative shortsightedness that encouraged and permitted such impediments to the national market is not likely to recur. In recent years the Ontario and Quebec Commissions have each taken action to encourage the cooperation of the two exchanges not only with respect to trading of interlisted securities, but also to regulation of common members.[492]

Differences of provincial policy do not always result in long term obstacles to interprovincial trading. When the exchanges agree among themselves, a national solution may be achieved either by accommodating their proposed rules to the various demands of the administrators or by, in effect, compelling the acquiescence of a dissident provincial commission. The adoption of a scheme of "stock exchange takeover bids" by the exchanges demonstrated their ability to impose their will even on the Ontario Securities Commission. The Montreal, Toronto and Vancouver Stock Exchanges, following their customary practice with such matters, agreed on a common set of rules to govern takeover bids made through their facilities under an exemption from the regulatory scheme in the securities acts.[493] The proposed rules were presented by each exchange to the administrator in its province; they were accepted in Quebec and not objected to in British Columbia, but the Ontario Commission was unwilling to grant its approval.[494] During this period Cornat Industries Limited made a stock exchange takeover bid for the shares of Bralorne Resources Limited through the Montreal and Vancouver Exchanges. The Ontario Securities Commission issued a temporary cease trading order to ensure that the bid could not be made to Ontario shareholders of Bralorne, but on convening a hearing to consider a permanent order the Commission discovered that the bid, approved by the offeree management, would undoubtedly succeed and that the only effect of its order would be to prevent Ontario residents from selling their shares at the premium price offered by Cornat. The Commission revoked its order and soon thereafter accepted a modified version of the pro-

posed rules.[495] The rules of the three exchanges were subsequently made uniform and have remained so until recently.[496] The Bralorne episode demonstrated yet again the difficulties a single commission may encounter in attempting to enforce a unique policy.[497] More importantly, it shows how cooperation between the exchanges in conjunction with the forces of a national marketplace may coerce a "cooperative," or at least a coordinated, administrative resolution as well.

A similar pattern of administrative supervision emerged with respect to the fixed commission rate structure of the Canadian exchanges prior to its abolition in 1982.[498] Because a number of securities are interlisted on several exchanges a uniform rate structure was necessary to prevent rate competition between them. The exchanges therefore agreed on commission rates among themselves and each then applied to the commission in its home province if regulatory approval were necessary there; if the proposed rate structure was not approved by any administrator, the exchanges would redesign it to meet his requirements. The initial application was usually made to the Ontario Securities Commission by the Toronto Stock Exchange, sometimes supplemented by submissions from other exchanges,[499] and the other administrators tended to accept its decision when their approval was subsequently sought even if they disagreed with it, thus reflecting a somewhat milder form of coerced cooperation.[500] Nevertheless, in 1977 the Quebec Commission clearly indicated its intention to follow its own policy in the future.[501]

New hearings on a national commission rate structure were convened in 1981, perhaps for the last time, but the format was different. Although the major proceeding was again held in Ontario, it was a joint hearing of the Alberta, British Columbia and Ontario administrators attended by the chairman of the Quebec Commission as an official observer, and counsel appeared and made submissions on behalf of the Quebec Commission.[502] The Alberta and Quebec Commissions also convened their own local hearings to consider the matter, presumably reflecting their intention to make an independent decision with respect to the stock exchange in their province.[503] In fact, they did so, but only after having each agreed to postpone the effective date of any decision to abolish fixed rates "to allow the other jurisdictions to react to the decision."[504] In June 1982 the Ontario Securities Commission announced its decision to unfix the Toronto Stock Exchange's commission rates and that of the Quebec Commission to the same effect with respect to the Montreal Exchange as of April 1, 1983.[505] The Alberta and British Columbia administrators reached a different conclusion but were forced to accommodate their peers with respect to securities interlisted on the eastern exchanges. In result, commission rates are now negotiated throughout the country for trading in securities that are listed on the Toronto or Montreal Exchange, but remain fixed for securities listed or interlisted only on the Alberta andVancouver Exchanges.[506] Thus while the final

hearing on nationwide commission rates involved a greater degree of procedural cooperation than previously between the provincial administrators, the substantive decisions represented an increased willingness by each to go its own way.

The recent adoption across Canada of a generic disclosure document and uniform standards for exemptions and salesmen for exchange traded options suggests the possibility of fuller cooperation among the Canadian administrators in the context of stock exchange activities.[507] Competition between the exchanges in connection with options trading has tended to be vigorous. In fact in an early decision the Ontario Securities Commission apparently concluded it was counterproductive and required the Montreal and Toronto Exchanges to cooperate in developing a joint clearing facility for their options trading.[508] With increased trading in options, however, the exchanges frequently found it necessary to obtain approval for the sale of new trading instruments in each province in which they were to be sold and encountered difficulties of consistency both within provinces and interjurisdictionally with respect to clearance and the qualifications of registrants.[509] As a result of these difficulties and in response to an announcement by the Ontario Commission of its intention to convene a hearing, the Toronto Stock Exchange organized a joint industry committee, including representatives of the Winnipeg Commodity Exchange, to "study the question of rationalization of the regulatory scheme in Canada for new exchange traded products."[510] The "Netpro Committee" published a report recommending uniformity of treatment for all such instruments throughout Canada with respect to disclosure requirements, educational qualifications for registration of salesmen and exemption orders and also the creation of a national body of representatives of self-regulatory organizations to establish the appropriate standards for registrants.[511] Although the approach taken to implement the report's recommendations followed past practice, that is, individual application by a local exchange to its own provincial administrator, the Canadian Securities Administrators have agreed on the principle and it has been adopted in several provinces.[512] The agreement of the Canadian administrators may foreshadow a general recognition of the regulatory implications of the *Netpro Report*, namely, that a coordinated national regulatory forum is necessary for exchange activities, and thus lead to further cooperation in this area; but the similarity of the issues to clearance of other securities on a nationwide basis and the previous independence of administrative action with respect to the exchanges make any inference from this one instance with respect to future cooperation uncertain.

Other practices of the administrators may provide an additional basis for prediction. Several of the provincial commissions have relied on the regulatory activities of extraprovincial exchanges in granting exemptions or other types of application, thus according them a form of

recognition that aids coordination of the provincial laws. The Ontario Securities Commission, for example, while refusing to grant a British Columbia reporting issuer equivalent status in Ontario because doing so would amount to acceptance of a listing on the Vancouver exchange for the purpose,[513] has accepted that Exchange's supervisory role in connection with the issuance of shares to a finder[514] and has also accepted the rules of the Alberta Stock Exchange governing takeover bids as equivalent to Toronto's.[515] Similar accommodation has been afforded a number of exchanges by the Alberta Commission through its recognition of the procedures of both the Toronto and Vancouver Exchanges for public offerings of shares of resource and industrial corporations.[516]

The terms of specific applications, however, are less significant in this respect than decisions of the provincial administrators evidencing a general acceptance of the self-regulatory role of an exchange in another province. In the past few years the incidence of this type of recognition has been increasing. The Ontario Securities Commission in two instances has approved options contracts to be executed through the Montreal and Vancouver Exchanges for sale in Ontario on the condition that the exchanges agree to cooperate in any investigation concerning trading in the new instruments through their facilities.[517] Even more important, the Alberta and Quebec Commissions have granted recognition to Canadian exchanges outside their province for specified purposes under their securities acts, such as, for example, the statutory exemption for stock exchange takeover bids,[518] and in each case conditioned the recognition on prior approval of any change in the relevant rules of the recognized exchanges.[519] These conditions go further than mere administrative accommodation of the regulatory scheme in another province; they superimpose the supervisory authority of the recognizing commission on that of the commission in the exchange's province and thus for the first time subject the exchanges to joint regulatory oversight. In fact the Quebec Commission may have gone further and assumed a practical power to require a recognized exchange to alter its rules if it wishes to retain recognition in Quebec.[520] While these actions may at first glance appear to reflect a new movement toward cooperative regulation, closer consideration suggests the contrary. Not only were the decisions taken independently, they also at least duplicate the authority of the administrators in the exchanges' province. Ironically, only the Ontario Commission's policy is framed in a manner that is respectful of the supervisory jurisdiction of other commissions.[521] This newly acquired overlapping authority may, however, lead to greater coordination with respect to approval by the provincial commissions of the relevant stock exchange rules.

In view of the obvious links and other interrelationships between the Canadian exchanges and their consistent attempts to achieve uniform rules, it is rather surprising that the provincial administrators have not

developed formal mechanisms for ensuring compatible exchange rules on a cooperative basis. Rather, the dominant pattern has been one of independent decision making, enabling the exchanges on some occasions to obtain their desired policies as a result of divisions among the administrators[522] and on others forcing them to comply with the requirements of a particular administrator. Although there are indications of an increasing tendency toward provincial cooperation with respect to the exchanges, there is little reason to expect a coherent cooperative system of regulatory supervision in the current context. A unified process for approval of new rules and policies prepared on a cooperative national basis by the self-regulatory organizations and for clearing their new trading "products" for sale throughout the country is a necessary element of a national market.[523]

Conclusions

Provincial Regulation

Although the provincial legislatures and their delegates have for over half a century attempted to ensure the effectiveness of their securities laws and to enhance the efficient functioning of the securities market through legislative and administrative coordination, the overall scheme of securities regulation in Canada remains less than harmonious. Indeed, the history of Canadian securities regulation during the past two decades is marked by differential obligations on issuers, different levels and types of protection for investors and frequently ineffective or overreaching enforcement. Even today, despite continuous efforts by the Canadian Securities Administrators to achieve a uniform or compatible national system of regulation, with the motivational assistance of potential federal "intrusion" into their domain,[524] the provincial laws and administrative policies differ in substance and in detail and there is no prospect of a diminution in regulatory diversity or its consequences. If anything, the present pace of securities law reform suggests the introduction of further disparities between the provincial statutes and ensuing alterations of policy and practice.[525]

However conscientious the provincial administrators may be in their attempts to reduce the impact of interjurisdictional differences of law and policy, this state of affairs is likely inevitable. Even where a commitment to uniform legislation exists, delays between the enactment of a "model" act and its adoption in other provinces are inescapable.[526] Not only do the statutes differ during this period, but new issues may emerge and the administration of the new legislation may bring to light inadequacies or oversights which require its amendment and which may be addressed in the bill introduced in another province, as occurred in Alberta.[527] In view of the fact that review of securities laws has become

an ongoing process, these factors alone make uniformity of legislation unlikely. It is all the more so when not all provinces are prepared to enact new legislation and when some are willing to introduce a statutory scheme reflecting different policies or a different structural approach.[528]

While administrative cooperation may go some way to accommodating legislative differences, its ability to do so varies with the nature of the regulatory requirements. The inconvenience and cost of duplicative or overlapping disclosure obligations, for example, may be alleviated by regulations, policies and exemption orders, as the practice of provincial administrators has shown,[529] but it is more difficult to coordinate clearance of disclosure documents which each administrator has a statutory duty to review.[530] In fact, the Canadian Securities Administrators have been less successful in dealing with this type of issue. Although they initially adopted a national policy to accelerate the process of reviewing prospectuses for national issues of securities, it was not sufficient to meet the needs of issuers and new ones were devised to shorten the clearance period further. The prompt offering prospectus system appears to have been attractive to the larger issuers for whom it was designed, but it is of questionable validity in several provinces and it is still too early finally to evaluate its success.[531]

Substantive requirements, whether imposed through legislation, policy statement or the exercise of discretion in individual cases, present still greater difficulties for coordination. A provincial administrator may be more reluctant to modify a statutory obligation or grant an exemption from a substantive policy, especially if he believes it important to the protection of investors, than to accept a different form of disclosure. In such circumstances a person must comply with the most stringent standard in the country or avoid the province that imposes it; but attempts at avoidance have on occasion been met by enforcement efforts that are inconsistent with the autonomy of other provinces and tend therefore to undermine the cooperative spirit that the administrators have generally attempted to foster. Although this type of enforcement has presented a potentially serious problem only in connection with Ontario's follow up offer obligation, the repeal of which is imminent, it might be invoked with respect to the evasion of any substantive duty and it is likely to recur, for there are invariably divergent policy preferences among the administrators.[532] The difficulties of enforcing substantive standards are exacerbated by the territorial limits on provincial jurisdiction, for the administrators' powers to prohibit trading by issuing a cease trading order or denying the use of the exemptions from registration are effective only within the province and cannot prevent trading elsewhere, unless the local commission makes a similar order.[533]

More significantly, some cases are incapable of resolution through any form of cooperation short of uniform legislation and policies; a single province, for example, cannot alone enact an effective "closed system"

to govern the sale of securities, without making it unduly harsh,[534] or provide a civil remedy for market transactions with a maximum amount of liability.[535] The fact that securities markets are increasingly international also presents issues which a provincial legislature cannot resolve, if at all, without erecting barriers to interprovincial and international dealings.[536] And although the provincial administrators have attempted to coordinate their regulatory efforts with respect to some activities of the stock exchanges, the results are frequently controlled by a combination of market forces and the cooperative efforts of the exchanges themselves.[537] Finally, resolution of the current issues relating to the functions and structure of financial institutions carrying on businesses in Canada is beyond the abilities of the securities administrators.[538]

Federal Regulation

It is at best doubtful whether cooperative efforts between provincial legislatures and the securities administrators can provide a comprehensive regulatory scheme for a national securities market.

> The fact is . . . that given the existence of ten different administrations and ten different governments, there are bound to be honest differences of opinion, political differences, inequalities in the resources available, in the standards of administration, in the interest shown and the support given by governments. The result is a permanent state of unevenness and imperfect co-operation in the administrations across the nation. With the best of will to co-operate, this situation will continue to exist.[539]

A coordinated system of regulation of the Canadian market requires a single agency with jurisdiction over all institutions and conduct that have transprovincial effects under legislation that applies nationwide. Only such a regime will permit a single clearance of securities for national distributions, a single registration for dealers carrying on business in more than one province and coherent supervision of the stock exchanges, as well as the provision of adequate remedies for investors and effective enforcement procedures for improper conduct.[540] A similar conclusion has been expressed in recent years by both economists and lawyers[541] and formed the basis of the recommendations for federal legislation and a "Canadian Securities Commission" in the *Proposals for a Securities Market Law for Canada* published in 1979.[542]

The case for federal regulation of the securities market in Canada has been presented elsewhere.[543] It is premised on the national character of the securities market,[544] a desire for uniformity where appropriate[545] and the inability of the provincial administrators to define or act in the national interest.[546] A further basis is provided by the increasing internationalization of securities markets, as even provincial administrators have acknowledged,[547] reflected in fraudulent schemes,[548] insider trad-

ing through Swiss bank accounts,[549] and perhaps more importantly in the growth of Euromarket trading,[550] the establishment of international relationships for exchange traded options,[551] the interlisting of securities on exchanges outside Canada and the recent announcement of formal arrangements by the two leading Canadian exchanges to permit electronic linkages with exchanges in the United States.[552] As is evident from the history of efforts to harmonize the provincial securities laws and their administration, the ability of the provinces to address these issues in an integrated fashion is necessarily too limited to be either effective or efficient.

Recognition of the need for a Canadian securities commission, however, does not itself determine the nature of the appropriate regulatory scheme. A number of alternative forms of federal involvement have been envisaged, from the addition of a thirteenth administrator to replacement of all of the provincial agencies by a single federal one.[553] Neither of these extremes is advisable; the former would only add to the existing problems of duplication and delay and the latter would deprive the provincial legislatures of their ability to develop their own policies to deal with local matters, including the provision of risk capital for the exploitation of natural resources.[554] Thus an intermediate solution of some sort is required. A joint national commission to administer the provincial laws[555] or both federal and provincial laws has also been suggested,[556] but these alternatives too have flaws; they would require multiple statutes and a council of ministers to determine major policy and approve amendments to umbrella legislation, thus diffusing political responsibility and increasing the difficulties of altering the scheme.[557] Surprisingly neither would require uniform provincial legislation, even though differences in the provincial and federal statutes might result in the continuance of some of the current enforcement difficulties.[558] Perhaps most important, the scheme would retain the ability of local administrators to undercut the effectiveness of a national commission through the ministerial council as appears to have occurred on occasion in Australia.[559] The *Canadian Securities Market Proposals* followed none of these recommendations, but was drafted to permit the maximum amount of flexibility so that any scheme that resulted from contemplated discussions between the federal government and the provinces, including different arrangements with individual provinces, could be accommodated within the current constitutional context.[560]

All of the proposed alternatives for a federal commission, assuming the framework imposed by the *Constitution Act, 1867*, would have federal legislation to regulate interprovincial transactions in securities and provincial legislation for intraprovincial trading and would adopt some form of interdelegation.[561] Such a scheme, however, requires the legislation at both levels to be drafted in a manner that ensures their coordination, that is, that each applies to all trades within its jurisdiction and only to them,

at the risk of being declared invalid. A valid scheme of this type is difficult to achieve with certainty, as has been seen with marketing schemes.[562] Although the Supreme Court has recently indicated a receptiveness to federal securities legislation, the basis of its invitation does not alleviate these concerns.[563] It would, therefore, be preferable to amend the Constitution to avoid such uncertainties by giving Parliament authority to legislate in relation to the securities market and trading in securities whether the transactions are local or interprovincial. It would then be open to Parliament and the provinces to devise a scheme for regulation of the Canadian securities market that would accommodate both national and local requirements. It would be possible, for example, to create a Canadian commission, staffed by provincial administrators,[564] to regulate all aspects of national offerings, whether intraprovincial or interprovincial, and to supervise the exchanges,[565] while leaving purely local distributions of securities to provincial policy and administration in any province that desires it.[566] In other words, it would be possible for both levels of government to enter negotiations with a view to the creation of an effective regulatory system for the Canadian market.

Notes

I wish to thank Purdy Crawford and Warren M.H. Grover for commenting on a draft of this paper. The paper has a completion date of August 1984.

1. S.M. 1912, c. 75. The Act was based on similar legislation enacted in Kansas in 1911.
2. See R.S.C. 1970, c. C-34, ss. 338, 340–342 and 358.
3. And the territories since 1966; see now, e.g., Securities Ordinance, R.O.Y.T. 1971, c. S-5 [hereinafter Yukon Securities Ordinance without cross reference.] The federal corporations legislation has included provisions, applicable only to Canadian corporations, governing prospectuses, takeover bids, insider trading, proxy solicitation and financial disclosure which can be characterized as relating to both corporation and securities law; see, e.g., *Multiple Access Ltd. v. McCutcheon* (1982), 18 Bus. L.R. 138 (S.C.C.); and see Canada Business Corporations Act, S.C. 1974–1975, c. 33, Parts X, XII, XIII, XVI [hereinafter Canada Business Corporations Act without cross reference.]
4. See, e.g., Anisman and Hogg, "Constitutional Aspects of Federal Securities Legislation", in 3 *Proposals for a Securities Market Law for Canada: Background Papers* (Minister of Supply and Services Canada, 1979), 135, at 147 [hereinafter 3 *Canada Securities Market Proposals*].
5. See, e.g., Anisman, "The Proposals for a Securities Market Law for Canada: Purpose and Process" (1981), 19 *Osgoode Hall L.J.* 329, at 331–34 and 347 n. 117; see also Nicholas, *Extraterritorial Application of the Securities Act by the Ontario Securities Commission* (unpublished paper prepared for O.S.C., 1983), at 15.
6. See Williamson, *Securities Regulation in Canada* (University of Toronto Press, 1960), at 12–14.
7. S.O. 1928, c. 34.
8. Williamson, *supra*, note 6, at 24.
9. Ibid., at 24–28.
10. See Smith, "Uniform Company Law in Canada" (1938), 16 *Can. B. Rev.* 701, at 703; see also Palmer, "Federalism and Uniformity of Laws: The Canadian Experience" (1965), 30 *L. & Contemp. Probs.* 250, at 254.

11. Williamson, *supra*, note 6, at 44–45. The specific provisions of the provincial acts are discussed ibid., *passim*; see also Williamson, *Supplement to Securities Regulation in Canada* (Securities Task Force, Govt. of Canada, 1966).
12. See *Report of the Attorney General's Committee on Securities Legislation in Ontario* (J.R. Kimber, Chairman: Govt. of Ontario, 1965) [hereinafter *Kimber Report*].
13. Securities Act, 1966, S.O. 1966, c. 142; see also Bray, "Ontario's Proposed Securities Act: An Overview, Its Purpose and Policy Premises", [1975] *O.S.C. Bull.* 235, at 243–44 (October).
14. See Anisman, *Takeover Bid Legislation in Canada: A Comparative Analysis* (CCH Canadian, 1974), at 5–7.
15. See, e.g., Bray, *supra*, note 13, at 246–47 and 254. Interestingly, the general recommendations of the Kimber Committee did not differ substantially from those of the Porter Commission on the same subject a year earlier; see *Report of the Royal Commission on Banking and Finance* (Queen's Printer Canada, 1964), at 349–52 [hereinafter *Porter Report*].
16. For a summary of developments between April 1972 and December 1973 see "A Note on Updating", in Anisman, *supra*, note 14, at iv–vi and viii. While no attempt will be made here to document every change in the effect of securities laws in Canada since 1973, suffice it to say that the Note cited above, if anything, understates the volume and regularity of new proposals; the conservative nature of the impression created by it becomes clear when it is recognized that new policies may be implemented not only through legislative amendment but also through policy statements and administrative rulings in each province and may be encouraged by proposals originating with legislative committees, government departments, securities industry organizations either singly or as joint industry reports, private securities practitioners and even royal commissions.
17. See *Report of the Committee of the Ontario Securities Commission on the Problems of Disclosure Raised for Investors by Business Combinations and Private Placements* (O.S.C., 1970) [hereinafter *O.S.C. Disclosure Report*]; see also Grover, "Book Review" (1971), 23 *Admin. L. Rev.* 309. The discussion in the *O.S.C. Disclosure Report* concerning disclosure appears to have been influenced by a report made to the United States Securities and Exchange Commission a year earlier; see *Disclosure to Investors: A Re-appraisal of Federal Administrative Policies under the '33 and '34 Acts* (Washington, D.C., undated: 1969) [hereinafter *Wheat Report*].
18. See Anisman, *supra*, note 16. The recommendations of the *O.S.C. Disclosure Report* are discussed ibid., *passim*.
19. Notice: Statement by the Honourable Eric A. Winkler, Minister of Consumer and Commercial Relations, on Introduction of the Securities Act, 1972, for First Reading, June 1st, 1972, [1972] *O.S.C. Bull.* 94, at 96 (June); see also Bray, *supra*, note 13, at 253–56.
20. See Securities Act, 1981, S.A. 1981, c. S-6.1 [hereinafter Alberta Securities Act, 1981 without cross reference]. One example of this type of difference is the exemptions from the prospectus requirements for "seed capital" and "government incentive securities"; see Anisman, *supra*, note 5, at 352–53; see also *infra*, text accompanying notes 236–253.
21. See, e.g., Anisman, *supra*, note 5, at 350 and 361 (insider trading liability, and timely disclosure and follow up offer requirements, respectively).
22. See Securities Act, 1980, S.M. 1980, c. 50 [hereinafter Manitoba Securities Act, 1980 without cross reference]; see also An Act to amend the Securities Act, Manitoba Bill 8, 1984. The 1984 amendments do not affect the new Act.
23. See Securities Act, S.Q. 1982, c. 48 [hereinafter Quebec Securities Act without cross reference]. On the sources of the new Quebec Act see Anisman, *supra*, note 5, at 349–50 (influence of *Proposals for a Securities Market Law for Canada* "pervasive"); LaRochelle, Pépin, and Simmonds, "Bill 85, Quebec's New Securities Act" (1983), 29 *McGill L.J.* 88, at 91 ("much influenced" by federal *Proposals*).
24. See *A Proposed New Securities Act and Draft Regulations* (B.C. Ministry of Consumer and Corporate Affairs, July 1982).

25. See Securities Act, S.N.S. 1984, c. 11 [hereinafter Nova Scotia Securities Act 1984 without cross reference].

26. See, e.g., Nova Scotia Securities Act 1984, ss. 57(1)(d) (private purchase exemption; $97,000), 77 and 78(1) and (4) (private takeover bid; pre-bid and post-bid integration). The provisions governing takeover bids are taken from Coleman, Emerson, and Jackson, *Report of the Committee to Review the Provisions of the Securities Act (Ontario) Relating to Take-over Bids and Issuer Bids* (Ontario, 1983).

27. The 1984 amendment to the Manitoba Act raises the private placement figure to $250,000 as does the proposed Ontario amendment; see Securities Act, R.S.M. 1970, c. S50, s. 19(3) as amended [hereinafter Manitoba Securities Act without cross reference]; Proposed Amendment to the Securities Act, ss. 35(1)4 and 76(1)(c), 7 *O.S.C. Bull.* 3419 (August 10, 1984) (pages inserted after page 3418). The Alberta legislation, however, is moving in the opposite direction; a recently released bill would lower the amount to $25,000 and require a disclosure document if the seller is the issuer, a control person or an underwriter; see Securities Amendment Act, 1984, Bill 55, Alta., 20th Legis., 2d Sess., s. 26 [hereinafter Alberta Bill 55 without cross reference].

    The securities administrators in Alberta, British Columbia, Ontario and Quebec agreed in January to adopt the report of the three practitioners subject to a number of changes based on a joint industry report, *The Regulation of Take-over Bids in Canada: Premium Private Agreement Transactions: Report of the Securities Industry Committee on Take-over Bids* (1983). A notice outlining the changes was published a few months later; see Notice: Consensus Amendments to Take-over Bid — Issuer Bid Rules, 7 *O.S.C. Bull.* 1415 (March 30, 1984). In view of the stated purpose of the new Nova Scotia Act, it is difficult to understand why the agreement of the four administrators was not brought to the draftsman's attention or if it was, why the Act was not modified. It is even more surprising that the agreement is not reflected at all in Alberta Bill 55; see ss. 44–53. The proposed Ontario bill also fails to adhere to the decisions described in the notice, for example, by omitting the provision governing pre-bid integration and by reducing the post-bid period; see *supra*, 7 *O.S.C. Bull.* 3419, Part XIX. The regulation of takeover bids is discussed *infra*, text at note 302 and following.

28. See Williamson, *supra*, note 6, at 25; *Supplement*, *supra*, note 11, at 2. A 1923 decision declaring such provisions to be extraterritorial legislation and therefore invalid was either overlooked or ignored; see *Ex parte Eli*, [1920] 1 W.W.R. 661 (Alta. S.C.).

29. See Smith, *supra*, note 10.

30. See Bray, *supra*, note 13, at 240–41.

31. See, e.g., Smith, *supra*, note 10 (public offering of shares); 2 *Report of the Royal Commission on Dominion-Provincial Relations* (King's Printer Canada, 1940), at 57–58 [hereinafter *Rowell-Sirois Report*]; *Porter Report*, *supra*, note 15, at 348–49 (costs of duplication and lack of uniformity).

32. See *Cansec: Legal and Administrative Concepts*, [1967] *O.S.C. Bull.* 61 (November). The proposal was premised on the provincial commissions' inability to handle adequately problems involving extraprovincial aspects. See also Howard, "Securities Regulation: Structure and Process", in 3 *Canada Securities Market Proposals*, *supra*, note 4, 1607, at 1689–97.

33. The number of national policy statements has grown from 22 to 35; see now National Policy Statements Nos. 1–35, 3 *CCH Can. Sec. L. Rep.* paras. 54-838–54-869d. See also Bray, *supra*, note 13, at 253–54.

34. See now Uniform Act Policies Nos. 2-01–2-13, 3 *CCH Can. Sec. L. Rep.* paras. 54-871–54-883. The national and uniform act policies are included in the Ontario section of the reporting service.

35. See, e.g., Request for Comments, 3 *O.S.C. Bull.* 3F (March 12, 1982) (proposal for "prompt offering prospectus" system: nine administrators to be sent comments); Notice: National Policy Statements and Uniform Act Policy Statements — Murphy Committee Recommendations, 4 *O.S.C. Bull.* 235A (September 17, 1982) (revision of national policies); Notice: Public Ownership in the Canadian Securities Industry, 2

O.S.C. Bull. 9A (July 10, 1981) (includes stock exchanges and Investment Dealers Association of Canada).

36. See, e.g., Notice: Remuneration of Senior Executives, 7 *O.S.C. Bull.* 3102 (July 20, 1984); Avis: Rémunération des dirigeants, 15 *Q.S.C. Bull.* 1.2.1 (June 15, 1984). Similarly a commission with a particular expertise may take primary responsibility for the development of a national policy relating to it as Alberta does with respect to matters concerning oil and gas; see, e.g., Notice: National Policy 2-B, 4 *O.S.C. Bull.* 443A (November 26, 1982).
37. See, e.g., British Columbia Policy No. 3-03, 2 *CCH Can. Sec. L. Rep.* para. 29-953 (national securities issues); *cf.* Avis: Instruction générale canadienne no. 32, 15 *Q.S.C. Bull.* 1.2.1 (April 6, 1984) (French version of national policy); and *cf. In re Lazerman Investment Metals International Inc., B.C. Corp., Fin. & Reg. Services Weekly Summary* (April 13, 1984), 5, at 12 ("of utmost importance that securities legislation throughout the continent . . . be applied consistently, wherever possible").
38. See, e.g., Notice: Public Meeting — Take-over Bid Report, 6 *O.S.C. Bull.* 4183 (December 2, 1983) (other securities administrators invited to attend). The chairmen of the Alberta and Quebec Commissions and the Director under the Canada Business Corporations Act were present at the meeting. See also Anisman, *supra*, note 5, at 354–55; Avis: Actions subalternes, 15 *Q.S.C. Bull.* 1.2.1 (May 11, 1984) (Quebec Commission will participate in hearings in Ontario) (policy hearings); *In re Offers for Shares of Hudson's Bay Co.*, [1979] *O.S.C. Bull.* 94 (April) (Ontario and federal Director); *In re The Toronto Stock Exchange*, 1 *O.S.C. Bull.* 20C (April 24, 1981) (Ontario, Quebec and Alberta) (adjudications). Several of the recent provincial acts expressly authorize joint hearings; see, e.g., Alberta Securities Act, 1981, ss. 16–17; Quebec Securities Act, ss. 288 and 312; and see Ontario Policy No. 2.3, 3 *CCH Can. Sec. L. Rep.* para. 54-905.
39. See Q.S.C., *New Quebec Securities Act: Working Paper* (1980), App. A at 2; see also, e.g., Racine, "Valeurs mobilières: un projet de loi innovateur" *Le Devoir* (Montreal) (January 22, 1981), p. 7, col. 1 at col. 2.
40. See, e.g., Quebec Securities Act, s. 276; *cf.* Anisman, Grover, Howard, and Williamson, *Proposals for a Securities Market Law for Canada: Draft Act* (Minister of Supply and Services Canada, 1979), vol. 1, s. 1.02; ibid., *Commentary*, vol. 2, at 1–2 [hereinafter 1 & 2 *Canada Securities Market Proposals*].
41. See *supra*, notes 10 and 33.
42. See *supra*, note 31.
43. See, e.g., Securities Act, R.S.O. 1980, c. 466, ss. 87 and 117 [hereinafter Ontario Securities Act without cross reference]. See also, e.g., Ontario Policy No. 7.1, 3 *CCH Can. Sec. L. Rep.* para. 54-949. Coordination of continuous disclosure requirements is discussed *infra*, text accompanying note 116 and following.
44. See, e.g., Ontario Securities Act, s. 91(1); see generally Bailey and Crawford, "The Take-Over Bid by Private Agreement: The Follow-Up Offer Obligation" (1983), 7 *Dalhousie L.J.* 93. Follow up offers are discussed *infra*, text following note 332.
45. See, e.g., Knowles, Annual Report of the Chairman, 3 *O.S.C. Bull.* 79A, at 83A (February 26, 1982) (Ontario laws "will become meaningless").
46. See Bailey and Crawford, *supra*, note 44, at 165.
47. See National Policy No. 1, 3 *CCH Can. Sec. L. Rep.* para. 54-838.
48. See Dey, Remarks to the Financial Post Conference on Risk Capital, 6 *O.S.C. Bull.* 1571, at 1574–75 (June 17, 1983).
49. Notice: Public Meeting — Take-over Bid Report, 6 *O.S.C. Bull.* 4183 (December 2, 1983).
50. Chairman Dey's remarks were directed at the standards imposed with respect to the raising of risk capital, that is, the distribution of securities, whereas the Commission's notice addresses the substantive requirements to govern takeover bids.
51. See, e.g., Anisman, *supra*, note 14, at 349, suggesting that the Ontario amendments of 1971 should not be followed; see *supra*, text accompanying note 18. A number of changes to the Ontario provisions were quickly recommended by a legislative com-

mittee; see Select Committee on Company Law, *Report on Mergers, Amalgamations and Certain Related Matters* (Ontario Legislative Assembly, 1973), summarized ibid., at 353–56.

52. *Cf.*, e.g. Truax v. Corrigan (1921), 257 U.S. 312, at 343 (U.S.S.C.) (should not use Constitution "to prevent the making of social experiments . . . in the insulated chambers afforded by the several States" *per* Holmes, J. dissenting); *New State Ice Co. v. Liebman* (1932), 285 U.S. 262, at 310 ("It is one of the happy incidents of the federal system that a single courageous state may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" *per* Brandeis, J. dissenting). See also Frankfurter, "Mr. Justice Brandeis and the Constitution", in Frankfurter (ed.), *Mr. Justice Brandeis* (Yale U. Press, 1932; Reprint: Da Capo Press, 1972), 47, at 84–85.

53. The history of Ontario's follow up offer requirement has involved just such attempts; see *infra*, text following note 332. See also, e.g., Notice: Consensus on Amendments to Take-over Bid — Issuer Bid Rules, 7 *O.S.C. Bull.* 1415, at 1418 (March 30, 1984) (administrators to consider prohibiting takeover bids not made in all provinces); Notice: O.S.C. Policy 6.2: Rights Offerings, 6 *O.S.C. Bull.* 608 and 655 (April 22, 1983) (rights offering excluding Ontario residents considered improper); see now Ontario Policy 6.2, s. VI.6, 3 *CCH Can. Sec. L. Rep.* para. 54-943. And see Avis: Avertissement aux courtiers et aux avocats — Placement de titres auprès d'acquéreurs avertis, 14 *Q.S.C. Bull.* 1.2.1. (August 19, 1983) (use of private placement exemptions in Quebec during distribution under prospectus in other provinces contrary to proper functioning of national market). The provincial responses may raise questions concerning the extraterritorial application of their laws, while the substantive merits of such attempts to shore up their regulatory schemes may involve weighing an issuer's ability to comply with the most stringent requirements in the nation against its freedom to select the provinces in which it will conduct specific transactions.

54. See, e.g., Anisman and Hogg, *supra*, note 4, at 142 (Q.S.C. policy led to trading barriers between Ontario and Quebec exchanges). The spate of state takeover laws enacted in the United States in the 1970s to protect local corporations against unwanted takeover bids might also be viewed in this manner; see, e.g., *Edgar v. Mite Corp.* (1983), 102 S. Ct. 2629 (U.S.S.C.) (declaring some state laws invalid). See also, e.g., Wilner and Landy, "The Tender Trap: State Takeover Statutes and Their Constitutionality" (1976), 45 *Fordham L. Rev.* 1; Langevoort, "State Tender Offer Legislation: Interests, Effects and Political Competency" (1977), 62 *Cornell L. Q.* 213.

55. See, e.g., 1 *Canada Securities Market Proposals*, *supra*, note 40, at viii.

56. See generally, e.g., 1 and 2 *Canada Securities Market Proposals*, *supra*, note 40. In fact, the regulation of takeover bids utilizes disclosure and criminal and civil remedies as well; the substantive requirements were originally designed to ensure that shareholders would have an adequate opportunity to consider the information disclosed without being subjected to undue pressures but have been moving toward the imposition of equal treatment for all shareholders; compare, e.g., Anisman, *supra*, note 14, chaps. III–IV with Coleman *et al.*, *supra*, note 26.

57. On disclosure generally see, e.g., Grover and Baillie, "Disclosure Requirements", in 3 *Canada Securities Market Proposals*, *supra*, note 4, at 349.

58. See, e.g., 2 *Canada Securities Market Proposals*, *supra*, note 40, at 60. The early securities acts also authorized a public official to refuse to permit the sale of shares that did not merit public funds; ibid., at 71–72. Similar powers have been retained in the provincial acts; see, e.g., Ontario Securities Act, s. 60; *cf.* 1 *Canada Securities Market Proposals*, s. 5.09; 2 ibid., at 82–85. The filing of a prospectus was also required in the early companies statutes, but review of them was usually left to the stock exchanges; see Williamson, *supra*, note 6, at 8–11, 14–20 and 68–85.

59. See, e.g., *O.S.C. Disclosure Report*, *supra*, note 17, at 27 n. 51.

60. For a cursory overview of these developments see 2 *Canada Securities Market Proposals*, *supra*, note 40, at 59–61. The "efficient market hypothesis" suggests that all publicly available information is reflected in the price of securities; see, e.g., Fama, *Foundations of Finance: Portfolio Decisions and Securities Prices* (Basic Books, 1976), chap. 5; Garbade, *Securities Markets* (McGraw-Hill, 1982), chap. 13.

61. See, e.g., Ontario Policy No. 5.6, 3 *CCH Can. Sec. L. Rep.* para. 54-936. The "prompt offering qualification system" is discussed *infra*, text following note 183.
62. Issuers subject to and entitled to the benefits of the continuous disclosure system are known as "reporting issuers" under the Canadian legislation; see, e.g., Ontario Securities Act, s. 1(1)38. A reporting issuer is essentially one that has filed a prospectus in the province or whose securities are listed on the Toronto Stock Exchange and thus are traded in the province. *Cf.* 1 *Canada Securities Market Proposals*, *supra*, note 40, Part 4, in which reporting issuer status is based exclusively on the trading market in an issuer's securities.
63. The information circular is technically required to accompany a solicitation of proxies and thus relates to the exercise by security holders of their rights with respect to the issuer's ongoing affairs as well as to trading in securities; see, e.g., Ontario Securities Act, ss. 83–85. These requirements provide a demonstration of the fact that matters conventionally characterized as corporate law and securities regulation are frequently inextricably interrelated and, indeed, not severable.
64. See, e.g., Ontario Securities Act, Part XVII. These provisions grew out of both legislative and self-regulatory sources; prior to 1978, for example, timely disclosure was required only by Uniform Act Policy No. 2-12 and by the stock exchanges.
65. See *supra*, note 62.
66. See, e.g., Ontario Securities Act, ss. 52 and 71(1); see also, e.g., 2 *Canada Securities Market Proposals*, *supra*, note 40, at 91–102.
67. See, e.g., Ontario Securities Act, ss. 71(4)–(7).
68. See generally Emerson, "Business Finance Under the 'Closed System' of the Ontario Securities Act: Statutory Scheme and Pitfalls", in Law Society of Upper Canada, *Special Lectures: Corporate Law in the 80s* (Richard de Boo, 1982), 29.
69. See *supra*, note 61.
70. See, e.g., Dey, Address to Financial Post, 6 *O.S.C. Bull.* 4186 (December 2, 1983). Civil liability is discussed *infra*, text at note 396 and following.
71. Licensing of brokers has long-standing historical roots; see Loss, 1 *Securities Regulation* (2d ed. Little, Brown, 1961), at 1–2. On licensing generally see, e.g., Connelly, "The Licensing of Securities Market Actors", in 3 *Canada Securities Market Proposals*, *supra*, note 4, at 1265.
72. See, e.g., Ontario Securities Act, s. 24. Registration of issuers was required by the early provincial acts to preclude a company from distributing its securities free of regulation other than through a registrant; see generally Williamson, *supra*, note 6, at 85–89 and 96–102. Similar requirements have been retained in the New Brunswick and Newfoundland Acts and in the Securities Ordinances of the two Territories.
73. The majority of provinces, following the Ontario model, require every person who trades to be registered and then contain a long list of exemptions to exclude trades other than in the course of a business and business transactions of a type that do not require the protections offered by registration; see, e.g., Ontario Securities Act, ss. 24 and 34. The Quebec Act, following the *Canada Proposals*, adopts a business rather than a trading standard; see Quebec Securities Act, ss. 148–149; 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 8.01; 2 ibid., at 127–31.
74. See, e.g., Connelly, *supra*, note 71, at 1308–15.
75. See ibid., at 1322–80; see also, e.g., R.R.O. 1980, Reg. 910, Part V [hereinafter Ontario Securities Regulation without cross reference].
76. See, e.g., Report to the Minister regarding Institutional Ownership of and Diversification into other Businesses by Securities Dealers Registered under the Securities Act, 4 *O.S.C. Bull.* 579A (December 31, 1982); La Propriété et la diversification des firmes de courtage, 14 *Q.S.C. Bull.* 2.1.1 (June 17, 1983); Quebec Policy No. Q-9, ss. 11–13, 3 *CCH Can. Sec. L. Rep.* para. 65-009.
77. See *supra*, note 76; see also, e.g., Saskatchewan Policy No. 3-07, 3 *CCH Can. Sec. L. Rep.* para. 69-308 (foreign ownership); Connelly, *supra*, note 71, at 1380–92 (public and foreign ownership); and see Ontario Securities Regulation, ss. 132–136 (foreign ownership).

78. See, e.g., O.S.C., Report on the Implications for the Canadian Capital Markets of the Provision by Financial Institutions of Access to Discount Brokerage Services, 6 *O.S.C. Bull.*, Special Supp. (October 31, 1983) [hereinafter *O.S.C. Discount Brokerage Report*]; Avis: Exercice de l'activité de courtier par les institutions financières, 14 *Q.S.C. Bull.* 1.2.1 (May 27, 1983).
79. See Notice: Policy Review: Competitive Position of the Securities Industry in Domestic and International Financial Markets, 7 *O.S.C. Bull.* 1907 (May 4, 1984); Notice: O.S.C. Securities Industry Policy Review: Preliminary Issues Paper, 7 *O.S.C. Bull.* 2766 (June 29, 1984).
80. See 2 *Canada Securities Market Proposals*, *supra*, note 40, at 145–49; see generally Dey and Makuch, "Government Supervision of Self-Regulatory Organizations in the Canadian Securities Industry", in 3 *Canada Securities Market Proposals*, *supra*, note 4, at 1399.
81. See Alberta Securities Act, s. 52; Ontario Securities Act, s. 22; Quebec Securities Act, Title VI.
82. See, e.g., Alberta Policy No. 3-13, 2 *CCH Can. Sec. L. Rep.* para. 24-513 (recognition of Toronto and Montreal Exchanges for purposes of issuer bids conditional on not changing rules without prior approval of Alberta Commission).
83. See, e.g., Quebec Securities Act, ss. 170 and 180. The auditing of member firms has long been delegated to self-regulatory bodies under the acts themselves; see, e.g., Ontario Securities Act, ss. 19–20.
84. See, e.g., Quebec Securities Act, s. 169; *In re Canadian Depository for Securities*, 7 *O.S.C. Bull.* 1807 (April 27, 1984).
85. It is worth pointing out that the primary allocation of powers to the exchanges stems from the legislatures; see, e.g., Toronto Stock Exchange Act, 1982, S.O. 1982, c. 27.
86. See *supra*, notes 71–79 and accompanying text.
87. See *supra*, note 58.
88. Mining companies have long been notorious for speculative share promotions that "mine only the public" and have been the subject of many regulatory policies designed to curb their excesses; for examples of the current policies see Ontario Policy 5.2, 3 *CCH Can. Sec. L. Rep.* para. 54-932; Alberta Policy No. 3-02, 2 *CCH Can. Sec. L. Rep.* para. 24-502; British Columbia Policy No. 3-07, 2 *CCH Can. Sec. L. Rep.* para. 29-957.
89. See, e.g., National Policy No. 7, 3 *CCH Can. Sec. L. Rep.* para. 54-844 (management fees); see also, e.g., *In re Lake Forest Fund*, 1 *O.S.C. Bull.* 5C (March 27, 1981) (commodity futures fund).
90. See, e.g., National Policy No. 33, 3 *CCH Can. Sec. L. Rep.* para. 54-869b; see also *In re Mosport Film Productions (1978)*, [1978] *O.S.C. Bull.* 349 (December).
91. See, e.g., ibid.; *In re Shoppers Investments Ltd.*, [1972] *O.S.C. Bull.* 215 (October).
92. See, e.g., National Policy No. 11, 3 *CCH Can. Sec. L. Rep.* para. 54-848 (change of management of mutual fund); National Policy No. 29, ss. III(2.1)(i) and (2.3)–(2.4), 3 *CCH Can. Sec. L. Rep.* para. 54-867 (non-arm's length transactions); see also, e.g., British Columbia Policy No. 3-30, 2 *CCH Can. Sec. L. Rep.* para. 29-995 (underwriter's conflict of interest).
93. See, e.g., Ontario Securities Act, ss. 106–115.
94. See, e.g., National Policy No. 29, *supra*, note 92 (mutual funds investing in mortgages); National Policy No. 33, *supra*, note 90; Ontario Policy No. 5.3, 3 *CCH Can. Sec. L. Rep.* para. 54-933 (mortgage and real estate investment trusts).
95. See Ontario Interim Policy No. 1.3, 3 *CCH Can. Sec. L. Rep.* para. 54-897; Avis: Actions subalternes, 15 *Q.S.C. Bull.* 1.2.1 (March 2, 1984). The proceedings that led to the initial policy are outlined in Anisman, *supra*, note 5, at 355 n. 154. The commissions by supplementary notice extended the expanded interim policy to "blank stock" powers exercised by directors; see Notice: Interim O.S.C. Policy 1.3, 7 *O.S.C. Bull.* 1991 (May 11, 1984); Avis: Actions subalternes, 15 *Q.S.C. Bull.* 1.2.1 (May 11, 1984). So far the initial policy in British Columbia remains intact; see British Columbia Policy No. 3-37, 2 *CCH Can. Sec. L. Rep.* para. 29-997d. For another example of a

similar exercise of this power see Ontario Policy No. 5.1, s. 10, 3 *CCH Can. Sec. L. Rep.* para. 54-931 ("green shoe" distributions).

96. See Ontario Interim Policy No. 1.3, *supra*, note 95; Avis: Actions subalternes, *supra*, note 95.

97. See Ontario Policy No. 9.1, 3 *CCH Can. Sec. L. Rep.* para. 54-960. The policy was initially suggested in an adjudicative proceeding; see *In re Cablecasting Ltd.*, [1978] *O.S.C. Bull.* 37 (February).

98. *In re Trizec Equities Ltd.*, 7 *O.S.C. Bull.* 2034 (May 11, 1984). The Commission's policy on "going private" transactions has been approved by the Ontario Legislature with respect to Ontario corporations; see Business Corporations Act, 1982, S.O. 1982, c. 4, s. 189.

99. See Request for Comments: Regulation of Target Company Defensive Tactics, 7 *O.S.C. Bull.* 1335 (March 23, 1984); Notice: Consensus on Amendments to Take-over Bid — Issuer Bid Rules, 7 *O.S.C. Bull.* 1415, at 1417 (March 30, 1984); Avis: Offres publiques — Placement, pendant la durée d'une offre publique, de titres de la société visée, 15 *Q.S.C. Bull.* 1.2.2 (April 6, 1984).

100. See, e.g., Ontario Securities Act, ss. 75 and 131; Securities Act, R.S.S. 1978, c. S-42, s. 121 [hereinafter Saskatchewan Securities Act without cross reference]. See also Anisman, "Insider Trading Under the Canada Business Corporations Act", in *Meredith Memorial Lectures 1975: Canada Business Corporations Act* (Richard de Boo, 1975), 151.

101. See generally Anisman, *supra*, note 14, chap. IV.

102. See *supra*, note 44.

103. See *supra*, notes 26 and 27; see also *supra*, text accompanying note 96. And see, e.g., Coleman, "Takeover Bids, Insider Bids and Going-Private Transactions — Recent Developments", in Law Society of Upper Canada, *supra*, note 68, 155, at 175–83 (pre-bid and post-bid purchases).

104. The "quasi-criminal" terminology usually adopted to distinguish provincial penal provisions from federal is a constitutional nicety which has no relevance to their substance and is therefore not adopted here.

105. See, e.g., Ontario Securities Act, s. 118 ($25,000 maximum fine for corporation; for individual $2,000, up to one year imprisonment, or both). See also, e.g., Anisman, *supra*, note 14, at 306–308. The United States Congress recently amended the Securities Exchange Act of 1934 to authorize a civil sanction of triple disgorgement of profits in order to deter improper insider trading; see Insider Trading Sanctions Act of 1984, Pub. Law 98-376.

106. See, e.g., Ontario Securities Act, ss. 126–128, 130–132. The acts also provide rights of rescission in a limited set of circumstances; see, e.g., ss. 70, 133–134. And the Ontario Act provides a civil remedy for a failure to make a required follow up offer; s. 129.

107. See, e.g., Ontario Securities Act, ss. 26, 67, 69, 123 and 124; see also 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 14.04.

108. See, e.g., Ontario Securities Act, ss. 16, 17 and 122; 1 *Canada Securities Market Proposals*, *supra*, note 40, ss. 14.05–14.07. The commissions may also bring an action on behalf of an issuer to require one of its insiders to disgorge his profits; e.g., Ontario Securities Act, s. 132.

109. The insider trading liability provisions of the provincial acts tend to require proof that the plaintiff traded with a defendant insider; see, e.g., Ontario Securities Act, ss. 131(1)–(2); but see Anisman, *supra*, note 100, at 234–43.

110. See, e.g., 2 *Canada Securities Market Proposals*, *supra*, note 40, at 246–47; see also, e.g., *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1974), 495 F.2d 228 (2d Cir.).

111. See, e.g., *Wilson v. Comtech Telecommunications Corp.* (1981), 648 F.2d 88 (2d Cir.) (insider trading).

112. See, e.g., *Blackie v. Barrack* (1975), 524 F.2d 891 (9th Cir.) (misrepresentations in filings).

113. See, e.g., *Elkind v. Liggett & Myers, Inc.* (1980), 635 F.2d 156 (2d Cir.) (tipping). The courts have not yet attempted to impose limits on the amount of liability for misrepre-

sentation without trading, other than through more restrictive standards of culpability; see, e.g., *Ross v. A.H. Robins Co., Inc.* (1979), 607 F.2d 545 (2d Cir.).

114. See American Law Institute, *Federal Securities Code*, Part 17 (L. Loss reporter, 1980) [hereinafter *A.L.I. Federal Securities Code*]; 1 *Canada Securities Market Proposals*, *supra*, note 40, Part 13; 2 ibid. The commentary to the *Canadian Proposals* contains a chart outlining the variations with respect to each element of each section; see 2 ibid., at 284–301.

115. See, e.g., Dey, *supra*, note 70; Avis: Sanctions civiles en matière d'information fausse ou trompeuse dans les documents d'information déposés auprès de la Commission, 15 *Q.S.C. Bull.* 1.2.1 (April 13, 1984).

116. However the interim periods differ; three provinces, British Columbia, Manitoba and Saskatchewan, require semi-annual financial statements and the three others quarterly filings; see, e.g., Saskatchewan Securities Act, s. 137; Ontario Securities Act, s. 76. The unproclaimed statutes in Manitoba and Nova Scotia follow the Ontario model.

117. See, e.g., Ontario Securities Act, Parts XVII, XVIII and XX; Saskatchewan Securities Act, Parts XI–XIII.

118. See Alberta Securities Act, s. 118; Ontario Securities Act, s. 74; Quebec Securities Act, ss. 73–74.

119. See Manitoba Securities Act, 1980, s. 74; Nova Scotia Securities Act, 1984, s. 61.

120. See Uniform Act Policy No. 2-12, 3 *CCH Can. Sec. L. Rep.* para. 54-882. The policy continues to apply in the other two uniform act provinces as well; *cf.* Ontario Policy 7.2, 3 *CCH Can. Sec. L. Rep.* para. 54-950. The timely disclosure requirement and the recently devised annual information form required as a condition of eligibility for use of a "simplified" prospectus provide the conceptual foundations of the still developing disclosure system. The latter document is discussed in connection with prospectus clearance, *infra*, text following note 183.

121. The importance of Ontario as the financial centre of Canada has frequently been acknowledged as the basis upon which Ontario has been able to require compliance with its securities laws by persons not subject to its ordinary jurisdiction. Access to the province's facilities constitutes sufficient incentive for most market participants; see, e.g., Dey, *supra*, note 48, at 1572.

122. See *Kimber Report*, *supra*, note 12, para. 9.04.

123. British Columbia, Manitoba and Saskatchewan; see, e.g., B.C. Securities Act, R.S.B.C. 1979, c. 380, ss. 105, 116 and 131 [hereinafter B.C. Securities Act without cross reference].

124. See *supra*, note 62 and text accompanying notes 65 to 69. See also Uniform Act Policy No. 2-01, 3 *CCH Can. Sec. L. Rep.* para. 54-871. The Alberta Commission has implemented a combination of these approaches on applications for recognition as a reporting issuer by issuers that had previously attained that status in another province; when granting such applications it commonly imposes a condition of continued compliance with the Alberta Act; see, e.g., *AMCA International Ltd., A.S.C. Summary* (October 7, 1983), 8. As the orders are frequently retroactive, the effect of a failure to meet the condition is not clear.

125. The more recent acts simply grant a right so to file while the others require an exemption to be obtained; compare, e.g., Ontario Securities Act, s. 81 with Saskatchewan Securities Act, ss. 111, 124 and 139. Several acts contain both approaches, the earlier ones exempting federal corporations from the proxy requirements because of constitutional concerns; see Alberta Securities Act, ss. 123(b) and 184 (former only discretionary); Saskatchewan Securities Act, s. 111(1) (federal corporations); see also, e.g., *Kimber Report*, *supra*, note 12, para. 9.07; *cf.* Anisman and Hogg, *supra*, note 4, at 151–52. The Ontario Securities Act automatically exempts issuers with equivalent obligations from soliciting proxies, but requires them to file an information circular with substantially the same information; see ss. 80–81 and 87. The Quebec Securities Act, s. 331(7) authorizes regulations to be promulgated for this purpose; the Regulation, however, contains provisions exempting only proxy circulars and insider reports; see ss. 157 and 174. Exemptions with respect to other filings must therefore be the subject of individual applications.

126. See, e.g., Ontario Policy No. 7.1, *supra*, note 43; Alberta Policy No. 3-26, 2 *CCH Can. Sec. L. Rep.* para. 24-530. Even though an exemption is automatic under the statute, it may not apply to corporations that make equivalent filings in other than their jurisdiction of incorporation, as for example United States corporations filing federally but incorporated at the state level. See also, e.g., *WIC Western International Communications Ltd., B.C. Corp., Fin. & Reg. Services Weekly Summary* (July 8, 1983), 13 (Canada Business Corporation Act filings). The Quebec Commission has exempted the permanent information record, presumably including all continuous disclosure documents, from the requirement that they be filed in French until they are incorporated by reference into a prospectus; see Decision No. 7007, 15 *Q.S.C. Bull.* 2.1.1 (February 17, 1984).

127. See, e.g., Alberta Policy No. 3-17, 2 *CCH Can. Sec. L. Rep.* para. 24-517; Ontario Policy No. 2.6, 3 *CCH Can. Sec. L. Rep.* para. 54-908; Quebec Policy No. Q-5, 3 *CCH Can. Sec. L. Rep.* para. 65-005 (dormant companies). The Ontario qualifying figure is higher than those in the other two policies; such differences are less serious, for these policies for the most part affect local issuers.

128. See Ontario Policy No. 2.6, *supra*, note 127.

129. See Manitoba Policy No. 3.08, 2 *CCH Can. Sec. L. Rep.* para. 34-998; Saskatchewan Policy No. 3-06, 3 *CCH Can. Sec. L. Rep.* para. 69-307. An issuer will have a sufficient local connection if its head office or a major part of its business is in the province, its shares are listed on a stock exchange in the province or it distributes its shares there on a continuous basis or there exclusively. The details of the definition are not identical in the two provinces.

130. See Ontario Policy No. 7.1, *supra*, note 43, s. II.D.2; Alberta Policy No. 3-26, *supra*, note 126, s. II.D.1. An annual report under the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C., ss. 78a ff., must be filed on Form 10-K within 90 days of the end of the issuer's fiscal year; quarterly reports on Form 10-Q are required within 45 days of the end of the relevant period.

131. See Quebec Securities Act, ss. 75–78 (annual report to be filed within 90 days and sent to shareholders within 140; quarterly statements to be filed and sent within 45 days).

132. See Notice: Filing and Delivering of Annual Financial Statements, 7 *O.S.C. Bull.* 2994 (July 13, 1984); O.S.C. Policy Statement 7.1: Amendment, 7 *O.S.C. Bull.* 3027 (July 13, 1984). The notice is repeated and the formal order published, respectively, in 7 *O.S.C. Bull.* 3226 and 3247 (July 27, 1984).

133. The Commission initially granted exemptions to permit a transitional period for issuers subject to the new Act; see Avis: Entrée en vigueur de la Loi sur les valeurs mobilières et du règlement — Dispositions transitoires, 14 *Q.S.C. Bull.* 1.2.1 (April 1, 1983); Decision No. 6813, 14 *Q.S.C. Bull.* 2.1.25 (April 15, 1983). Since then exemptions have been considered on an individual basis; see, e.g., *British Controlled Oilfields Ltée*, 14 *Q.S.C. Bull.* 8.2.1 (August 26, 1983) (granted).

134. See, e.g., *Canadien Pacifique Ltée*, 14 *Q.S.C. Bull.* 8.3.1 (June 10, 1983) (denied delay); 14 *Q.S.C. Bull.* 8.2.1 (July 22, 1983) (five day delay granted); 14 *Q.S.C. Bull.* 8.2.1 (September 2, 1983) (ten day delay granted); *Asamera Inc.*, 14 *Q.S.C. Bull.* 8.3.1 (December 2, 1983) (denied because arguments not convincing); *Agra Industries Ltd.*, 14 *Q.S.C. Bull.* 8.3.1 (December 9, 1983) (same). Compare *Relax Inns Partnerships I and II*, 15 *Q.S.C. Bull.* 2.1.1 (March 16, 1984) (granted exemption from filing quarterlies); similar exemptions had been obtained in Ontario and Alberta but the Commission's reasons do not suggest that uniformity was a factor in its decision.

135. See Avis: Avant-projet de modification des règles concernant l'information périodique, 15 *Q.S.C. Bull.* 1.2.1 (June 22, 1984). The proposal is intended to alleviate the reporting burden on small issuers, but it is likely to have little effect without uniform adoption except with respect to local issuers.

136. See, e.g., B.C. Securities Act, ss. 107–108.

137. See, e.g., Manitoba Securities Act, s. 109.1; see also *O.S.C. Disclosure Report*, *supra*, note 17, para. 7.13. The provision is criticized in Anisman, *supra*, note 14, at 108–15.

138. See Alberta Securities Act, s. 147; Quebec Securities Act, s. 96. Subsequent reports must be filed within ten days of any change in holdings in Alberta (s. 147(2)) and in Quebec within the same period if the change exceeds 1 percent of an insider's holdings and otherwise within ten days of the end of the month in which the transaction occurs; s. 97. The Nova Scotia Securities Act, 1984, s. 93, adopts the latter approach.

139. See *In Re Royal Trustco Ltd.*, 2 *O.S.C. Bull.* 322C (October 9, 1981), affirmed (1983), 42 O.R. (2d) 147 (Div'l Ct.).

140. See Alberta Securities Act, s. 149 (acquisition of 5 percent by other than offeror to be reported within three days); Nova Scotia Securities Act, 1984, s. 95 (acquisition of 2.5 percent on fully diluted basis by other than offeror to be reported before 10 a.m. the next day); Quebec Securities Act, s. 143 (5 percent by other than offeror reportable before 10 a.m. the next day); Proposed Amendments to the Securities Act, s. 99, 7 *O.S.C. Bull.* 3419 (August 10, 1984) (5 percent by other than offeror reportable before 10 a.m. the next day and subsequent acquisitions of 2.5 percent within same time). The proposed amendments would also require immediate disclosure of acquisitions of 10 percent followed by a filing within two days and reporting at the 20 and subsequent 5 percent levels the day following their attainment; ibid., ss. 98 and 100.

141. See Poursuite pénale: Affaire des offres publiques d'achat de Nova Scotia Savings & Loan Company, par Exco et par Halifax Developments Holding, 15 *Q.S.C. Bull.* 3.2.2 (February 2, 1984).

142. See, e.g., Ontario Securities Act, ss. 1(1)17(ii) and (2)–(6); *In re British American Oil Co. Ltd.*, [1967] *O.S.C. Bull.* 9 (June); see also, e.g., Anisman, *supra*, note 100, at 188–91.

143. See, e.g., Anisman, *supra*, note 100, at 196–98; Ontario Policy No. 10.1, 3 *CCH Can. Sec. L. Rep.* para. 54-966; Quebec Policy No. Q-10, 3 *CCH Can. Sec. L. Rep.* para. 65-011.

144. See, e.g., *In re George Weston Ltd.*, 7 *O.S.C. Bull.* 3249 (July 27, 1984).

145. See Quebec Regulations, O.C. 660-83, s. 175 [hereinafter Quebec Securities Regulation without cross reference].

146. *Les Entreprises Canadien Pacifique Ltée*, 14 *Q.S.C. Bull.* 2.3.1 (September 9, 1983); see also Quebec Securities Act, s. 290 (chairman's casting vote).

147. See, e.g., *Cominco Ltée*, 14 *Q.S.C. Bull.* 8.2.1 (December 16, 1983); *Nova, An Alberta Corp.*, 15 *Q.S.C. Bull.* 8.2.1 (February 17, 1984); *Industrie Redpath Ltée*, 15 *Q.S.C. Bull.* 8.2.1 (May 18, 1984). The bulletin, however, contains denials of applications for exemption from the regulation for which no explanation is included; see, e.g., *Canadien Pacifique Ltée*, 14 *Q.S.C. Bull.* 8.3.1 (December 16, 1983).

148. See *supra*, note 118.

149. See Quebec Securities Act, s. 74. The provision is even more stringent than the description in the text for it requires a reasonable belief that no trading has occurred or will. Compare Ontario Securities Act, s. 74(3)(b). For a fourth variation see 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 7.03.

150. See Alberta Securities Act, s. 118(2); Ontario Securities Act, s. 74(2).

151. See Ontario Securities Act, ss. 74(3)–(4); Ontario Policy No. 2.2, s. C(h), 3 *CCH Can. Sec. L. Rep.* para. 54-904.

152. Ontario Securities Act, s. 74 is drafted in a manner that assumes the continued confidentiality of such filings, especially when compared with the discretionary approach in s. 137.

153. See, e.g., Ontario Policy No. 1.4, 3 *CCH Can. Sec. L. Rep.* para. 54-898 ("reciprocal enforcement of cease trading orders"). Enforcement is discussed *infra*, text following note 364.

154. See, e.g., *supra*, note 36.

155. See, e.g., Cleland, "Applications of Automation in the Canadian Securities Industry: Present and Projected", in 3 *Canada Securities Market Proposals*, *supra*, note 4, 947, at 990–92; see also Notice: Ontario-Based Computer Companies to Help OSC Serve Investors Better, 4 *O.S.C. Bull.* 432A (November 19, 1982) (Commission entered contract with Canquote to disseminate information in insider trading

reports). And see *supra*, note 129 and accompanying text. This possibility would be more difficult with documents vetted or reviewed by the administrators; the continuous disclosure filings, however, tend not to be.

156. Because the price of securities must be related to the market, it will not be determined until the last possible moment before a prospectus becomes final, that is, before it can be sold; see, e.g., McQuillan, *Going Public in Canada* (C.I.C.A., 1971), at 45–66.

157. For a discussion of the differences of treatment as of 1960 and 1966, see Williamson, *supra*, note 6 and note 11, chap. III. There is no recent exhaustive treatment of Canadian prospectus requirements; for a general treatment and an overview of the various approaches see Grover and Baillie, *supra*, note 57, at 400–406; Hadden, Forbes, and Simmonds, *Canadian Business Organization Law* (forthcoming), chap. 7.

158. See *supra*, note 10.

159. See, e.g., Saucier, "Securities Acts of the Provinces of Canada", in Continuing Legal Education, *Seminar on Private Companies* (Alberta, 1968).

160. See *Kimber Report*, *supra*, note 12, paras. 5.09 and 5.12; see also, e.g., Ontario Securities Act, s. 55(1) ("full, true, and plain disclosure"); Ontario Securities Regulation, ss. 29–35 and 37.

161. See *Report of the Canadian Committee on Mutual Funds and Investment Contracts* (Queen's Printer Canada, 1969), paras. 19.03–19.05, 19.09 and 19.14(3); Bray, *supra*, note 13, at 253. Of the original 22 national policies, 8 dealt with mutual funds; of the current 35, 13 do so expressly, and mutual funds are the primary beneficiaries of National Policy No. 30, discussed *infra*, following note 174.

162. See National Policy Nos. 1–3, 5–15, 23–24, 26, 28–30, 32–33 and 35, *supra*, note 33. The expertise of a commission in a given area may determine the allocation of primary responsibility for a particular policy; see, *supra*, note 36.

163. See, e.g., British Columbia Policy No. 3-01, 2 *CCH Can. Sec. L. Rep.* para. 29-951 (guidelines for reports on mining, oil and gas properties to be read in conjunction with national policies); British Columbia Policy No. 3-03, *supra*, note 37 (procedures for national issues). The latter policy interprets British Columbia Securities Act, s. 37(5) in a manner that is inconsistent with the statutory scheme but facilitates common treatment of national issues in the uniform act provinces by authorizing solicitation during a "waiting period" of expressions of interest in a forthcoming new issue.

See also, e.g., Avis: Attestations de l'émetteur et du courtier présentées au prospectus, 14 *Q.S.C. Bull.* 1.2.3 (November 11, 1983) (accepting English version of certification from other provinces in prospectus).

164. See, e.g., Ontario Policy Nos. 5.1–5.4 and 5.8, 3 *CCH Can. Sec. L. Rep.* paras. 54-931–54-934 and 54-938.

165. See National Policy No. 1, *supra*, note 47; see also Bray, *supra*, note 13, at 253–54 ("urgent that agreement be reached to facilitate the filing of prospectuses . . . nationally").

166. The description of these practices is based on my research for the federal Securities Task Force in 1967; see Anisman, *supra*, note 5, at 333 n. 24.

167. See, e.g., Nova Scotia Securities Regulation, s. 24; B.C. Securities Act, s. 37(5); see also N.W.T. Securities Ordinance, R.O.N.W.T. 1974, c. S-5, s. 23 [hereinafter N.W.T. Securities Ordinance without cross reference]; Yukon Securities Ordinance, s. 23(6); and see the Registrar's Order made under the latter section, 1 *CCH Can. Sec. L. Rep.* para. 19-993.

168. See *supra*, note 166.

169. See, e.g., Lockwood, "Procedures in Cross-Country Prospectus Clearance and Regulation by Policy Statement", in Law Society of Upper Canada, *Special Lectures: Corporate and Securities Law* (Richard de Boo, 1972), 111, at 115.

170. The procedure in the policy is not quite as straightforward as the text suggests, for it assumes that each province will apply its own standards and that acceptance by all need not follow upon the "principal jurisdiction's" declaration of acceptability; see National Policy No. 1, *supra*, note 47, ss. 8–10.

171. The uniform acts, except British Columbia's, require a preliminary prospectus and

provide a minimum ten day waiting period before a final prospectus may be accepted; see, e.g., Ontario Securities Act, ss. 52–54 and 64. For the treatment of preliminary prospectuses in jurisdictions that did not require them and the filing requirements with respect to finals as of 1972 see Lockwood, *supra*, note 169, at 113–14 and 125. The current practice in British Columbia is stated in British Columbia Policy No. 3-03, *supra*, note 37. The Quebec Securities Act, ss. 20–24 now follow the uniform act procedure.

172. See Lockwood, *supra*, note 169, at 114–16. These conclusions are supported by the fact that the average clearance time for prospectuses filed in British Columbia, Ontario and Quebec from 1969 to 1974 was one to two months; see Williamson, "Canadian Capital Markets", in 3 *Canada Securities Market Proposals*, *supra*, note 4, 1, at 63–65.

173. See *supra*, note 170; and see Lockwood, *supra*, note 169, at 115–16 (before policy issuers dealt directly with all provinces and avoided such delays); Alboini, *Ontario Securities Law* (Richard de Boo, 1980), at 360.

174. See, e.g., *In re BBC-RI Services Ltd.*, 7 *O.S.C. Bull.* 2577 (June 15, 1984); *A.S.C. Summary* (June 22, 1984), 12 (orders extending time for refiling of prospectus because comments on deficiencies not made by principal jurisdiction within time required by National Policy No. 1).

175. National Policy No. 30, 3 *CCH Can. Sec. L. Rep.* para. 54-868 (processing of "seasoned prospectuses"). A "seasoned prospectus" is defined by the policy as one qualifying securities of a mutual fund refiling a current prospectus or of another issuer that has filed a prospectus within the preceding two years. The policy does not apply to speculative issuers like junior mining corporations.

176. See, e.g., Ontario Securities Act, s. 61(1).

177. See, e.g, Saskatchewan Securities Act, s. 63. The grace period was of no effect because of the provisions of the old Quebec Act; see Lockwood, *supra*, note 169, at 122–23.

178. See Uniform Act Policy No. 2-02, 3 *CCH Can. Sec. L. Rep.* para. 54-872, adopted at the same time as the initial national policies.

179. See, e.g., Ontario Securities Act, s. 61; Quebec Securities Act, s. 34.

180. See the O.S.C. Memorandum appended to National Policy No. 30, *supra*, note 175.

181. The times for clearance of mutual fund prospectuses in British Columbia, Ontario and Quebec from 1969 to 1974 leave the same impression; see Williamson, *supra*, note 172, at 66.

182. See *In re BBC-RI Services Ltd.*, *supra*, note 174; see also Knowles, A Current Need to Accept Responsibility, 3 *O.S.C. Bull.* 363A, at 365A–66A (June 25, 1982).

183. But see *contra* Review Committee, Memorandum re National and Uniform Act Policy Statements, 4 *O.S.C. Bull.* 244E, at 245E (September 17, 1982) (R.J. Murphy, chairman) (National Policy No. 1 "has generally operated well" but "should be reviewed and updated to further improve its effectiveness").

184. See Notice: Proposal for a Prompt Qualification System for Securities of Senior Issuers, 3 *O.S.C. Bull.* 122A (March 12, 1982) (dealers' proposal); Notice: A Simplified Prospectus System Proposed by the Commission des valeurs mobilières du Québec, 3 *O.S.C. Bull.* 201A (March 26, 1982) (Q.S.C. proposal). These events are described in Knowles, *supra*, note 182, at 365A–66A.

185. See now, e.g., Ontario Policy No. 5.6, *supra*, note 61, ss. B, C and H.

186. See, e.g., ibid., ss. B.1 (d)–(e) and C.1 (market value of shares $100 million and consolidated equity of same amount or net after tax income of $15 million; minimum A rating on debt). These conditions have not been adopted for share issues in Quebec; see Quebec Securities Act, ss. 18 and 84; Quebec Securities Regulation, ss. 159–162.

187. The original policy imposed a notification procedure for approval; unless the issuer was informed of deficiencies within ten days, the form was deemed to have been accepted. Once accepted, full review of refilings will only occur if an issuer is given 30 days advance notice in writing; see now, e.g., Ontario Policy No. 5.6, *supra*, note 61, s. F.

188. See Notice: O.S.C. Policy 3-67, 4 *O.S.C. Bull.* 394A (October 29, 1982); *In re a Prompt*

Offering Qualification System, 4 *O.S.C. Bull.* 241B (October 29, 1982) (order implementing policy).

189. See Notice: Policy for a Prompt Offering Qualification System: Adoption by Alberta, 4 *O.S.C. Bull.* 400A (November 5, 1982).

190. See Manitoba Policy No. 3-12; Saskatchewan Policy No. 3-09, reproduced in 6 *O.S.C. Bull.* 97 (March 18, 1983).

191. See, e.g, Ontario Policy No. 5.6, *supra*, note 61, ss. F.1–2; see also Avis: Application à certains éléments du dossier d'information initial de la procédure définie par l'instruction générale canadienne no. 1, 15 *Q.S.C. Bull.* 1.2.3 (March 2, 1984).

192. A statement to this effect is included in the Alberta and Manitoba policies in the *CCH Can. Sec. L. Rep.*

193. See, e.g., *Canadian National Ry. Co.*, 7 *O.S.C. Bull.* 2135 (May 18, 1984) (reporting issuer since August 1982; required to file all reports filed with S.E.C. since 1978 and annual reports to Parliament); *Suncor Inc.*, 14 *Q.S.C. Bull.* 2.1.1 (May 6, 1983).

194. See, e.g., *General Motors Acceptance Corp. of Canada Ltd.*, *A.S.C. Summary* (April 22, 1983), 6; *Asamera Inc.*, *A.S.C. Summary* (May 18, 1984), 19.

195. See Alberta Securities Act, s. 117; British Columbia Policy No. 3-40, s. 3.4, 2 *CCH Can. Sec. L. Rep.* para. 29-997g (Alberta or Ontario). Both Manitoba and Saskatchewan will accept such filings from Ontario or Alberta for the full three year period; see Manitoba Policy No. 3-12, 2 *CCH Can. Sec. L. Rep.* para. 34-999d; Saskatchewan Policy No. 3-09, 3 *CCH Can. Sec. L. Rep.* para. 69-310.

196. See Quebec Securities Act, s. 18.

197. See Avis: Utilisation du prospectus simplifié, 14 *Q.S.C. Bull.* 1.2.1 (November 11, 1983). The Commission views a prospectus of any kind as too basic a disclosure document to permit an exemption from the requirement that a French version be filed but parts of the continuous disclosure file that are not incorporated in a simplified prospectus need not be filed in French; see Decision No. 7007, *supra*, note 126. The utility of this exception is dubious.

198. See Quebec Policy No. Q-1, 3 *CCH Can. Sec. L. Rep.* para. 65-001. The clearance period for a local simplified prospectus is seven days; ibid.

199. Presumably it will be adopted at least in Nova Scotia in view of its new act. It has been accepted in the Yukon; see Registrar's Order, re Prompt Offering Prospectus System, 1 *CCH Can. Sec. L. Rep.* para 19-994 (Alberta and Ontario).

200. See Alberta Policy No. 3-23, 2 *CCH Can. Sec. L. Rep.* para. 24-527; British Columbia Policy No. 3-40, *supra*, note 195; Ontario Policy No. 5.6, *supra*, note 61. The Ontario policy was adopted by an order of the Commission made under its general power to grant exemptions from the prospectus requirements on the application of "an interested person"; Ontario Securities Act, s. 73. The applicant was the Commission's Director. The order as amended is attached to its Policy as Appendix C.

201. See *supra*, note 190; see also, e.g., Manitoba Securities Act, s. 20. Although the Manitoba Policy does not clearly state that the exemption is granted to an issuer, its stated intent of duplicating the Ontario scheme indicates that its effect relates to issuers rather than distributions and s. 20 of the Manitoba Act was amended in 1984 to authorize this result.

202. See Quebec Securities Act, ss. 18–19, 64 and 84–88; see also LaRochelle, *et al.*, *supra*, note 23, at 105–107.

203. See Alberta Securities Act, ss. 84 and 93 (prospectus and summary statement); Ontario Securities Act, ss. 55 and 62. The argument is stronger under the Ontario Act which expressly authorizes both a short form prospectus and a summary statement "if permitted by the regulations." A general exemption applicable to all issuers is, in effect, a regulation not adopted in accordance with the requirements of the Act. Indeed, the policy statement itself refers to the prompt offering document as a "short form prospectus."

204. While this approach would remove any questions about the Director's standing to apply for an exempting order under, for example, Ontario Securities Act, s. 73 and thus prevent a challenge to the policy on this basis, it is not clear that even an

exemption granted to a specific issuer would be valid in view of the express provisions of s. 62, but the argument is a closer one and the practical effect of invalidity would likely lead to a result supporting such exemptions. The safest type of exemption order is one relating to a specific distribution, rather than to the issuer generally.

Although it is unlikely that an issuer would challenge the policy, a dissatisfied purchaser of a security sold under it might wish to do so in some circumstances. See also *supra*, text accompanying note 201.

205. See B.C. Securities Act, s. 37(5). The subsection authorizes the B.C. Superintendant to accept prospectuses that are "in accordance with the law of another Province." The arguments concerning the validity of the policy in British Columbia are like those with respect to Alberta, but without the added support of express authorization of summary prospectuses; see s. 37(2). Only a simplified prospectus approved in Quebec and probably Manitoba is authorized by law if the argument in the text is correct. But *cf. Re Ontario Film and Video Appreciation Society* (1983), 41 O.R. (2d) 583, at 592-93 (Div'l Ct.) (exercise of discretion even if under statutory authority not law), affirmed (1984), 45 O.R. (2d) 80 (C.A.).

206. See Notice: Prompt Offering Qualification System, 7 *O.S.C. Bull.* 571 (February 3, 1984); Alberta Bill 55, *supra*, note 27, s. 21 (authorizing regulations). The Nova Scotia Act does not do so, however.

207. See, e.g., Notice: O.S.C. Policy 3-67, 4 *O.S.C. Bull.* 574A (December 24, 1982); *In re a Prompt Offering Qualification System*, 4 *O.S.C. Bull.* 425B (December 31, 1982) (order).

208. See *supra*, note 190.

209. See Notice: O.S.C. Policy 5.6, 6 *O.S.C. Bull.* 756 (April 29, 1983); 6 *O.S.C. Bull.* 859 (May 6, 1983).

210. See *In re a Prompt Offering Qualification System*, 7 *O.S.C. Bull.* 580 and 591 (February 3, 1984); Notice: O.S.C. Policy 5.6, 7 *O.S.C. Bull.* 768 and 777 (February 17, 1984); see also Manitoba Policy No. 3-12, *supra*, note 195. The original Saskatchewan policy still applies in terms as individual exemption applications are necessary. British Columbia Policy No. 3-40, *supra*, note 195, s. 2.4, permitting secondary offerings was added in January 1984 but the policy does not apply to securities exchange takeover bids; see Local Policy Statement No. 3-40, *B.C. Corp., Fin. & Reg. Services Weekly Summary* (January 20, 1984), 6.

211. See Notice: O.S.C. Policy 5.6, *supra*, note 209, at 860; and see British Columbia Policy No. 3-40, *supra*, note 195, s. 6.5.

212. See Avis: Projet d'instruction générale no. Q-15, 15 *Q.S.C. Bull.* 1.2.1 (January 27, 1984); 15 *Q.S.C. Bull.* 1.2.1 (April 20, 1984). The proposal is based on Rule 415, the shelf registration rule under the United States Securities Act of 1933.

213. Such filings are noted in the bulletins published by the commissions.

214. See, e.g., Ontario Securities Act, s. 71(1); see also, e.g., 2 *Canada Securities Market Proposals*, *supra*, note 40, at 91–92.

215. See, e.g., Ontario Securities Act, s. 71(1)(a), (c) and (d) (private placements), s. 71(1)(h) (rights offering) and s. 71(1)(n) (employees).

216. See, e.g., *In re R.F. Oil Industries Ltd., A.S.C. Summary*, (January 13, 1984), 3, at 5 (different hold periods may discriminate against Alberta shareholders); *cf.*, e.g., Makens, "An American State-Federal Perspective on the Proposals" (1981), 19 *Osgoode Hall L.J.* 424, at 438 (exemptions must be parallel to be effective).

217. New Exchange Traded Products Committee, Conclusions concerning the Regulatory Scheme in Canada for Options, Futures, Options on Futures and Exchange Traded Precious Metal Certificates, paras. 2.01(b) and 2.02(b) (October 12, 1983), included in Toronto Stock Exchange, Submission to the O.S.C. concerning Rationalization of the Regulatory Scheme in Canada for Options, Futures, Options on Futures and Exchange Traded Precious Metal Certificates (March 6, 1984) [hereinafter *Netpro Report*].

218. The various exemptions in the provincial acts are listed in comparative tables as of 1960 and 1966 in Williamson, *supra*, note 6, at 409–20; note 11, at 454–506. For a

concordance of the provincial acts as of 1980, prepared by the staff of the Ontario Securities Commission, see 3 *CCH Can. Sec. L. Rep.* para. 50-000a.

219. See, e.g., B.C. Securities Act, s. 1(1) "primary distribution to the public"; compare Ontario Securities Act, s. 1(1)11 ("distribution"). See also, e.g., *O.S.C. Disclosure Report*, *supra*, note 17, paras. 5.14–5.26; *In re Warren Explorations Ltd.*, [1976] *O.S.C. Bull.* 111 (April).

220. See, e.g., Ontario Securities Act, ss. 71(4)–(7); see generally Emerson, *supra*, note 68; see also, e.g., 1 *Canada Securities Market Proposals*, *supra*, note 40, Part 6; 2 ibid.

221. See *supra*, notes 22, 24 and 25 and accompanying text.

222. See Uniform Act Policy No. 2-05, 3 *CCH Can. Sec. L. Rep.* para. 54-875.

223. See Alberta Policy No. 3-22, 2 *CCH Can. Sec. L. Rep.* para. 24-525; British Columbia Policy No. 3-24, 2 *CCH Can. Sec. L. Rep.* para. 29-978.

224. See, e.g, *In re Playboy Enterprises Inc.*, 7 *O.S.C. Bull.* 3005 (July 13, 1984); *A.S.C. Summary* (July 13, 1984), 15; 15 *Q.S.C. Bull.* 2.1.1 (July 20, 1984) (issuer bid); *Little Long Lac Gold Mines Ltd.*, *A.S.C. Summary* (January 7, 1983), 18 (amalgamation; successor corporation's shares listed on M.E., T.S.E. and V.S.E. but not A.S.E.).

225. See, e.g., *In re Conseil Scolaire de l'Ile de Montréal*, 6 *O.S.C. Bull.* 2150 (July 22, 1983); see also Quebec Securities Act, s. 41(2)(a).

226. See, e.g., *In re Lochiel Exploration Ltd.*, 7 *O.S.C. Bull.* 293 (January 20, 1984); A.S.C. Order, 2 *CCH Can. Sec. L. Rep.* para. 24-703 (dividend reinvestment plans).

227. See, e.g., *Cuvier Mines Ltd.*, *A.S.C. Summary* (October 28, 1983), 43; *Massey-Ferguson Ltd.*, *A.S.C. Summary* (January 6, 1984) (prospectuses); see also, e.g., *In Re Oakwood Petroleums Ltd.*, *A.S.C. Summary* (May 18, 1984), 27 (detailed report or any greater disclosure required by another province); 7 *O.S.C. Bull.* 1995 (May 11, 1984) (annual report and proxy circular plus further information required by Director).

228. See, e.g., *Consumer Distributing Co. Ltd.*, *A.S.C. Summary* (June 24, 1983), 8; *In re Sorrel Resources Ltd.*, 7 *O.S.C. Bull.* 891 (February 24, 1984). The practice is more frequent in Alberta than in Ontario. See also *supra*, note 195.

229. See, e.g., *In re Pitney Bowes Inc.*, 7 *O.S.C. Bull.* 2778 (June 29, 1984) (resale on N.Y.S.E.); *In Re Gulch Resources Ltd.*, 4 *O.S.C. Bull.* 139B (September 3, 1982) (resale on A.S.E.); *Colonial Oil & Gas Ltd.*, *A.S.C. Summary* (February 25, 1983), 6 (resale on T.S.E. or V.S.E.).

230. See *In re a Proposal of the Toronto Stock Exchange*, 5 *O.S.C. Bull.* 161B (March 4, 1983); T.S.E., Statement of Policy regarding Distributions . . . by Exchange Offering Prospectus, Circular No. 5 (March 1983); Manitoba Policy No. 3-13, 2 *CCH Can. Sec. L. Rep.* para. 34-999f; and see, e.g., *In re Chauvco Resources Ltd.*, *A.S.C. Summary* (May 18, 1984), 7. The Toronto Exchange apparently applied to the Alberta Commission for a general ruling, but none has appeared in its summary; see *In re Distribution of Securities to Residents of Alberta through the Facilities of the T.S.E.*, *A.S.C. Summary* (January 27, 1984), 3 (notice of hearing).

231. See, e.g., Ontario Securities Act, s. 71(1)(n); see also 2 *Canada Securities Market Proposals*, *supra*, note 40, at 95.

232. See Quebec Securities Act, ss. 52(5) and 53. The latter provision applies to all of the "exempt" distributions in the preceding section, although most of them too are not subject to review in other provinces. The additional investor protection may be desirable as a matter of principle, although perhaps too wide in its inclusion of sales to senior executives of an issuer.

233. See, e.g., *In re Nova Beaucage Mines Ltd.*, 7 *O.S.C. Bull.* 889 (February 24, 1984); compare *Sodeq Estrie Inc.*, 14 *Q.S.C. Bull.* 5.4.1 (January 7, 1983).

234. See *supra*, note 218. No matter how they are counted there are well over 40 different and sometimes overlapping exemptions under the Ontario Act.

235. The treatment of warrants provides a ready illustration of the complexity; see, e.g., *In re Certain Proposed Amendments to the Securities Act*, 4 *O.S.C. Bull.* 406B (December 24, 1982). The Alberta Commission has adopted a series of blanket rulings like those in Ontario; see 2 *CCH Can. Sec. L. Rep.* paras. 24-706–24-707a. See also Emerson, *supra*, note 68, at 72–78.

236. See *A.L.I. Federal Securities Code*, *supra*, note 114, s. 202(41)(B); see also ibid., Tent. Draft No. 1, s. 227(b) (1972).

237. Other exemptions are available for sales to institutional investors; see, e.g., Ontario Securities Act, ss. 71(1)(a), (c) and (d). Subsection (d) permits a sale for $97,000 or more to any investor, including an individual.

238. See Ontario Securities Act, s. 71(1)(p).

239. See Exemptions from Prospectus Filing Requirements after Proclamation of the Securities Act, 1978, *O.S.C. Weekly Summary* (March 30, 1979), Supp. X-1. See now Ontario Securities Regulation, s. 20.

240. See Exemptions from Prospectus Filing Requirements, *supra*, note 239; Ontario Securities Regulation, s. 21. And see Ontario Policy No. 6.1, 3 *CCH Can. Sec. L. Rep.* para. 54-943.

241. Ontario Securities Regulation, s. 15(2).

242. See Ontario Securities Regulation, s. 14(g); see also *In re Welland Woods*, [1979] *O.S.C. Bull.* 343 (November). For a more detailed discussion of these provisions see Emerson, *supra*, note 68, at 60–70.

243. See Manitoba Securities Act, 1980, s. 71(1)(o); Nova Scotia Securities Act, 1984, ss. 57(1)(p) and (w). The former provision follows the Ontario Act without change; the latter two follow the Ontario Act and Regulation and thus specify that the number of offerees and purchasers applies to all jurisdictions.

244. See Alberta Policy No. 3-22, *supra*, note 223; and see, e.g., *Pacific Village, B.C. Corp., Fin. & Reg. Services Weekly Summary* (February 22, 1980), 8; *"Pitfall" and "Let's Make a Deal" Show, B.C. Corp., Fin. & Reg. Services Weeky Summary* (July 25, 1980), 8.

245. See Alberta Policy No. 3-22, *supra*, note 223.

246. See Alberta Securities Act, ss. 107(1)(p)–(s). Alberta Securities Regulation, s. 16 follows the Ontario provision concerning an offering memorandum; if one is used, it must grant a contractual right of action. Alberta Bill 55, s. 26(j) would replace the current provisions with integrated exemptions for seed capital and government incentive distributions; the proposed provisions contain no limit on solicitations, permit sales to a maximum of 50 purchasers, require an offering memorandum and a statutory declaration from each purchaser and limit distributions by an issuer to one per year but without a maximum amount for successive uses. The Ontario Securities Commission too has released proposed amendments which would bring its seed capital and government incentive exemptions closer to the existing Alberta Act, but not to the proposed Alberta provisions; see Proposed Amendment to the Securities Act, ss. 76(1)(t)–(w), 7 *O.S.C. Bull.* 3419 (August 10, 1984).

247. See Quebec Securities Act, ss. 47–48. The Act also requires that the contract of sale contain a term attesting to the purchaser's sophistication and knowledge of the investment; see Quebec Securities Regulation, s. 103. And it expressly exempts resales between the initial purchasers under the exemption.

248. See Quebec Securities Act, s. 49.

249. See Avis: Projet d'instruction générale no. Q-16, 15 *Q.S.C. Bull.* 1.2.1 (June 8, 1984).

250. See British Columbia Policy No. 3-24, *supra*, note 223.

251. See Manitoba Policy No. 3-15, 2 *CCH Can. Sec. L. Rep.* para. 34-999h.

252. See Manitoba Policy No. 3-14, 2 *CCH Can. Sec. L. Rep.* para. 34-999g.

253. It is likely that the Alberta and Ontario Commissions, at least, would be willing to consider favourably exemption applications requesting modification of some of the conditions to facilitate an interjurisdictional offer, for each of them has waived the numerical limits, mainly for limited offerings originating in the United States; see *In re Celltech Communications Inc.*, 6 *O.S.C. Bull.* 3633 (October 31, 1983); *White Water Arizona Limited Partnership, A.S.C. Summary* (January 28, 1983), 6; *Hydra Beam Industries (Canada) Ltd., A.S.C. Summary* (November 18, 1983), 8.

254. See, e.g., 2 *Canada Securities Market Proposals*, *supra*, note 40, at 93–94.

255. See, e.g., Ontario Securities Act, s. 71(1)(h). Three of the acts, those in New-

foundland, Nova Scotia and Prince Edward Island, do not specify a period and require the administrator to approve the exempt distribution; see, e.g., P.E.I. Securities Act, R.S.P.E.I. 1974, c. S-4, ss. 2(3)(e) and 13(a) [hereinafter P.E.I. Securities Act without cross reference]. A similar exemption in the territorial ordinances applies only to the registration requirements; see, e.g., Yukon Securities Ordinance, s. 3(k). The Yukon Registrar has made an order containing prospectus exemptions; see Order, s. 5(c), 1 *CCH Can. Sec. L. Rep.* para. 19-991.

256. See Uniform Act Policy No. 2-05, 3 *CCH Can. Sec. L. Rep.* para. 54-875; Quebec Securities Act, s. 53. The notice requirements are included in the regulations in Quebec; see Quebec Securities Regulation, ss. 107–108 and 111–113. Although the New Brunswick Act contains the same exemption, the New Brunswick administrator has not subscribed to the policy.

257. See Quebec Securities Act, ss. 52(1) and 53. The Quebec Commission also has refused to exempt an offering circular for a rights offering from the requirement that documents be in French; see *Pen West Petroleum Ltd.*, 15 *Q.S.C. Bull.* 2.1.9 (May 18, 1984) (76 common and 34 A shareholders in Quebec); *Cineplex Corp.*, 15 *Q.S.C. Bull.* 2.1.1 (July 13, 1984) (30 shareholders); but see *Canadian Worldwide Energy Ltd.*, 15 *Q.S.C. Bull.* 2.1.1 (August 3, 1984) (granted where 57 shareholders in Quebec).

258. The difference may be a result of including the prenotification period for several exemptions in a single provision. Not all of the other exemptions covered require prenotification in the uniform act provinces; compare, e.g, Ontario Securities Act, s. 71(1)(f) with Quebec Securities Act, ss. 52–53.

259. See Ontario Policy No. 6.2, *supra*, note 53, ss. III.3–4 and VI. The latter provision governing standby commitments is known as the Commission's "green shoe" policy.

260. See *Sogevex Inc.*, 15 *Q.S.C. Bull.* 5.4.1 (March 23, 1984).

261. See British Columbia Policy No. 3-05, ss. 2 and 3(g), 2 *CCH Can. Sec. L. Rep.* para. 29-955.

262. See *Sogevex Inc.*, *supra*, note 260; *Sodeq Estrie Inc.*, *supra*, note 233. As the reasons for these exemption denials are quite terse and as the *Sodeq* application did not involve a rights offering, the existence of a "green shoe" policy like Ontario's in Quebec is a matter of inference. It is also not clear whether the Quebec Commission would take the same position with issuers whose primary jurisdiction is not Quebec.

263. See Ontario Policy No. 6.2, *supra*, note 53, s. III.5 (fewer than 5 percent of outstanding securities of class).

264. See ibid., s. VI.6. But see *Seemar Mines Ltd., B.C. Corp., Fin. & Reg. Services Weekly Summary* (August 12, 1983), 10 (rights offering in British Columbia conditioned on delivery to B.C. shareholders of prospectus filed in Ontario). Attempts to prevent issuers from avoiding a province with a requirement peculiar to it are discussed *infra*, text accompanying notes 333 to 405.

265. A double preemptive right like that required under Ontario's "green shoe" policy has been imposed in the corporations statutes in some American states but only with respect to closely held corporations; see, e.g., Maine Business Corporation Act, s. 623, reproduced in Frey, Choper, Leech and Morris, *Cases and Materials on Corporations* (2d ed. Little Brown, 1977), at 841–42. Such conduct would be a breach of the directors' or majority shareholders' duty in Ontario only if its purpose were to further their own interests rather than those of the corporation; see, e.g., *Martin v. Gibson* (1907), 15 O.L.R. 623 (Ch.); *Howard Smith Ltd. v. Ampol Petroleum Ltd.*, [1974] A.C. 821 (P.C.). In any event the Commission has not imposed similar fiduciary strictures on the use of other exemptions; see, e.g., Ontario Securities Act, ss. 71(1)(b), (d) and (l). Individual substantive standards raise difficult issues with respect to the effectiveness of provincial policy because of limitations inherent in a federal system and are discussed *infra*, text accompanying notes 365 to 405.

266. See, e.g., Ontario Securities Act, s. 71(5); Ontario Securities Regulation, s. 17(4).

267. See Ontario Policy No. 2.6, *supra*, note 127, ss. III.1–2. Appendix A to the Policy specifies the terms of the notification.

268. See, e.g., *In re Anlagebank Zurich*, [1969] *O.S.C. Bull.* 45 (April); *In re Dalco Petroleum Corp.*, 1 *O.S.C. Bull.* 49C (May 22, 1981); 2 *Canada Securities Market*

Proposals, *supra*, note 40, at 99–100. The jurisdiction of the provincial commissions over such sales is based on the fact that a transaction has its origin in the province, usually because the issuer is incorporated or has its head office there, and a number of the commissions have thus granted exemptions for distributions made exclusively extrajurisdictionally; see, e.g., *In re Medina Energy Resources Corp.*, 7 *O.S.C. Bull.* 288 (January 20, 1984); *In re Albany 84–85 Energy Program*, *A.S.C. Summary* (May 18, 1984), 17 (sales of units by Alberta partnership exclusively in Quebec where Q.S.C. order prohibits resale except under closed system); *Golden Sceptre Resources Ltd.*, *B.C. Corp., Fin. & Reg. Services Weekly Summary* (January 21, 1983), 13 (private placement conditional on undertaking by English buyer that no resale in British Columbia). The Quebec Securities Act, s. 12 expressly requires the filing of a prospectus for a distribution from Quebec to a person outside the province unless the Commission does not object within 15 days of being notified of the proposed sale; see also Quebec Securities Regulation, s. 115; and see, e.g., *Banque Royale du Canada*, 14 *Q.S.C. Bull.* 5.2.2 (November 25, 1983). The Ontario Commission initially promulgated a policy statement, Ontario Policy No. 1.5, which indicated its readiness to grant exemptions, but repealed it and instead published an "interpretation note" stating that it will consider a distribution with sufficient Ontario contacts to be made in the province even where the securities are sold to persons outside it unless the issuer adopts measures that reasonably ensure that the securities "come to rest" outside the province; the same standard was enunciated in the earlier policy but the note goes further and lists a series of factors relevant to a determination of this test, among them that the issuer has "a number" of Ontario shareholders or is "closely followed" by Ontario investors, and for private placements requires the holding period that would be applicable under the Ontario Act; Ontario Interpretation Note 1, 3 *CCH Can. Sec. L. Rep.* para. 54-890. The same concern is reflected in the duty imposed on registrants to ensure that they do not assist their clients in purchasing securities being distributed in another province but for which no prospectus has been filed locally; see, e.g., National Policy Nos. 20 and 32, 3 *CCH Can. Sec. L. Rep.* paras. 54-857 and 54-869a; Saskatchewan Policy No. 3-01, 3 *CCH Can. Sec. L. Rep.* para. 69-301. And see Ontario Policy No. 1.5 and Interpretation Note 1.

The commissions' policies with respect to distributions to investors outside the province also reflect a desire to protect the reputation of the Canadian market and of their local issuers; see, e.g., ibid.; *Golden Sceptre Resources Ltd.*, *supra* (further condition that buyer in England agree to comply with applicable securities laws in jurisdiction of resale); *In re Rock Enterprises Ltd.*, 8 *Q.S.C. Bull.* (December 22, 1977). See also, e.g., *Belgium Standard Ltée*, 15 *Q.S.C. Bull.* 2.1.7 (January 27, 1984) (cease trading order where apparent promotional scheme in United States using rights offering as initial step).

269. See *In re Consolidated Ascot Petroleum Corp.*, 6 *O.S.C. Bull.* 3169 (September 30, 1983). The offering was accepted in British Columbia; see *Consolidated Ascot Petroleum Corp.*, *B.C. Corp., Fin. & Reg. Services Weekly Summary* (October 14, 1983), 13.

270. *In re Consolidated Ascot Petroleum Corp.*, *supra*, note 269, at 3171.

271. Ibid.

272. *In re Sorrel Resources Ltd.*, 7 *O.S.C. Bull.* 891 (February 24, 1984); see also 7 *O.S.C. Bull.* 1003 (March 2, 1984) (order). Interestingly Consolidated Ascot had been formed through an amalgamation and became a reporting issuer in British Columbia the same month.

273. See *In re Sorrel Resources Ltd.*, *supra*, note 272, at 892–93. Consolidated Ascot at the time of its exemption application had applied to list its shares on the Toronto Exchange and had received "preliminary assurances" that they would qualify; compare ibid., at 892 with *In re Consolidated Ascot Petroleum Corp.*, *supra*, note 269, at 3170. The timely disclosure obligations are discussed *supra*, text accompanying notes 118 to 120 and following note 147.

274. See *supra*, notes 195 and 228 and accompanying text.

275. *In re Sorrel Resources Ltd.*, *supra*, note 272, at 894.

276. But the policy does not specify a maximum period of non-disclosure, nor does it

require the information to be filed; compare Uniform Act Policy No. 2-12, *supra*, note 120, with Alberta Securities Act, s. 118.

277. See, e.g., *In re A.T. & T. Co.*, 7 *O.S.C. Bull.* 278 (January 20, 1984); *In re AIA Industries Inc.*, 7 *O.S.C. Bull.* 2348 (June 1, 1984); *In re Great Basins Petroleum Co.*, 4 *O.S.C. Bull.* 87B (August 13, 1982).

278. See *In re Consolidated Ascot Petroleum Corp.*, *supra*, note 269, at 3169 (32 percent of issued common shares; 24 percent of shareholders).

279. See *In re the First Trade in Securities Acquired pursuant to Certain Exemptions*, 7 *O.S.C. Bull.* 2876 (July 6, 1984) (order made on application of O.S.C. Director). See also, e.g., *In re Pitney Bowes Inc.*, *supra*, note 229; *In re Norfolk Southern Corp.*, 7 *O.S.C. Bull.* 1525 (April 6, 1984) (employee purchase plan).

280. See *Ascot Petroleum Corp.*, *A.S.C. Summary* (August 26, 1983), 8 (resales only through Vancouver Stock Exchange); see also, e.g., *Western Feedlots Ltd.*, *A.S.C. Summary* (May 27, 1983), 10 (conditional on issuer filing continuous disclosure reports "as if" it were a reporting issuer); *Manitou-Barvue Mines Ltd.*, *A.S.C. Summary* (June 3, 1983), 12 (resales only through Toronto Stock Exchange).

281. See, e.g., *In re Vista International Petroleums Ltd.*, *A.S.C. Summary* (May 25, 1984), 7; *In re Mountain-West Resources Inc.*, *A.S.C. Summary* (July 13, 1984), 10 (applying test). *Cf. Énergie et Ressources (CAM) Ltée*, 14 *Q.S.C. Bull.* 2.3.1 (February 2, 1984) (permit resales through Toronto Stock Exchange after holding period by four purchasers of shares of Quebec corporation where 9 percent of shareholders holding 4.1 percent of shares in Quebec).

282. See, e.g., *In re A.T. & T. Co.*, *supra*, note 277 (4,683 Canadian shareholders less than 1 percent); *In Re Pitney Bowes Inc.*, *supra*, note 229 (1,010 Ontario employees). In *Consolidated Ascot* 232 Ontario shareholders held 2,283,186 shares; see *supra*, note 278.

283. The Commission's order, *supra*, note 279, applies only to issuers incorporated outside Canada. In any event, if the liquidity of securities that might be received in an exempt distribution in the future influences investment decisions, investors would be more inclined to non-reporting issuers in the United States with wider shareholdings than those in other provinces.

284. See *In re Consolidated Ascot Petroleum Corp.*, *supra*, note 269, at 3170; compare *In re R.F. Oil Industries Ltd.*, *supra*, note 216.

285. See, e.g., Ontario Securities Act, ss. 1(1)11 and 42. A prospectus is required for a distribution. A "distribution" is a trade, that is, a sale, by an issuer of its securities, by a person who controls it or by a purchaser subject to the resale requirements who fails to comply with them; see also ss. 71(4)–(6).

286. See *Gregory & Co. Inc. v. Q.S.C.*, [1961] S.C.R. 584.

287. See *R. v. W. McKenzie Securities Ltd*, (1966), 56 D.L.R. (2d) 56 (Man. C.A.), leave to appeal denied *sub nom. West v. R.*, [1966] S.C.R. ix. The *Gregory* and *McKenzie* cases are discussed in Anisman and Hogg, *supra*, note 4, at 145–46.

288. See Ontario Securities Act, ss. 71(4)–(6); see also Alberta Securities Act, ss. 109–111; Quebec Securities Act, ss. 58–61.

289. Unless the purchaser is acting as an agent or, possibly, a conduit for an issuer or control person; see Ontario Securities Act, s. 1(1)(11). See also Dey, *supra*, note 48, at 1571 (trades into Ontario must "happen naturally").

290. See 6 *O.S.C. Bull.* at 3170. A broker does not violate any of the policies concerning improper distributions if he merely trades in securities already distributed, for example, through a stock exchange outside the province.

291. See Quebec Policy No. Q-12, 3 *CCH Can. Sec. L. Rep.* para. 570-012. The definition of a substantial block and the point at which filing is required are not clear. It appears that a substantial block is one held by a "principal shareholder" or any 10 percent shareholder of the securities "subject to resale" and that a dealer must report "when the number of securities subject to resale represents at least 5 per cent of the total number of securities subject to the secondary distribution." The qualifying phrases are quite ambiguous in the context of the policy's other definitions.

292. In fact, the policy was probably directed at trades by such investors; *cf.* 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 2.17(d); 2 ibid., at 18– 19. The policy is arguably invalid; it treats as a distribution trades that are not so defined and the section on which it explicitly relies for authority appears to be otherwise intended.

293. The Ontario shareholders of Consolidated Ascot presumably purchased their shares in normal transactions through the Vancouver Exchange; see *supra*, note 290.

294. The Review Committee, *supra*, note 183, at 246E recommended that a national policy should be adopted to deal with problems arising from interjurisdictional resales.

295. See, e.g., *Belgium Standard Ltée*, *supra*, note 268 (rights offering in Quebec and Europe; rights of other shareholders sold and payment sent to them).

296. Ontario Policy No. 6.2, *supra*, note 53, s. VI.6. The impact on Ontario shareholders is determined by the test applicable to exemptions for resales. The Commission will object if the issuer is a reporting issuer in Ontario or a non-reporting issuer with over 5 percent of the shareholders resident in Ontario or with Ontario residents holding over that percentage of the outstanding shares. In other cases the Director of the Commission may waive compliance with the Policy; ibid., s. VII.

297. The Commission has taken this potentially perverse effect into account when deciding whether to issue a cease trading order; see, e.g., *In re Universal Explorations Ltd.*, 7 *O.S.C. Bull.* 1425 (March 30, 1984).

298. The effect of cease trading orders, as of provincial laws generally, is limited territorially; see, e.g., *Black v. Doherty McCuaig Ltd.*, [1974] 4 W.W.R. 342 (B.C.S.C.).

299. See, e.g., *In re Hutton Commodity Reserve Fund Ltd.*, 6 *O.S.C. Bull.* 1076 (May 20, 1983) (preliminary prospectus filed in all provinces but Quebec); *In re MacLeod-Stedman Inc.*, 7 *O.S.C. Bull.* 3121 (July 20, 1984) (same).

300. See Avis: Avertissement aux courtiers et aux avocats, 14 *Q.S.C. Bull.* 1.2.1 (August 19, 1983).

301. See, e.g., *Wood Gundy Ltée*, 15 *Q.S.C. Bull.* 2.1.3 (April 13, 1984). While it appears that the proceeding was based on conduct of the type addressed in the Commission's notice, the major issues related to a direct violation of the provisions of the new Act and the firm's failure to supervise its salesmen adequately.

302. See, e.g., *supra*, notes 16, 17, 26 and 27.

303. See, e.g., Ontario Securities Act, ss. 94–96 (requiring disclosure by offeror and offeree directors).

304. See, e.g., Ontario Securities Act, ss. 89(1)2–4, 6–8 and 13; see also, e.g., Anisman, *supra*, note 14, at 67–82.

305. See, e.g., Ontario Securities Act, s. 89(1)12. Not all of the provincial acts restrict permissible conditions; see, e.g., Saskatchewan Securities Act, s. 89. And see Anisman, *supra*, note 14, at 82–87.

306. See, e.g., Ontario Securities Act, ss. 89(3), 90 and 91(3). Again these requirements are not uniform; see, e.g., Anisman, *supra*, note 14, at 90–93. See also Ontario Securities Act, s. 89(1)9 (pro rata takeup in partial bid).

307. See, e.g., Ontario Securities Act, ss. 89(1)10, 89(3) and 90; *cf.* Canada Business Corporations Act, s. 190(f); Anisman, *supra*, note 14, at 100–108.

308. See, e.g., Ontario Securities Act, s. 99.

309. See *supra*, text accompanying notes 12 to 27.

310. See *supra*, note 103 and accompanying text.

311. See ibid.; see also *supra*, notes 26 and 27.

312. See, e.g., Toronto Stock Exchange, Bylaws, Part XXIII; Policies, Part XVII (June 1977), 4 *CCH Can. Sec. L. Rep.* para. 815-131 (introduction of stock exchange takeover bid rules); see also Policy Statement on Normal Course Issuer Bids (October 1, 1983), 4 *CCH Can. Sec. L. Rep.* para. 815-241. And see Notice: Stock Exchange Take-over Bids, 7 *O.S.C. Bull.* 3227 (July 27, 1984) (interim amendments).

313. Compare, e.g., Anisman, *supra*, note 14, at 37–44 and 127–30 with Coleman, *supra*, note 103 and Bailey and Crawford, *supra*, note 44. See also, e.g., Coleman *et al.*, *supra*, note 26; *Securities Industry Committee Report*, *supra*, note 27. The takeover

bid provisions of the British Columbia and Saskatchewan Acts have not been amended since their adoption in 1967; nor have those in the Canada Business Corporations Act, but amendments to it have been prepared; see Osler, Hoskin and Harcourt, *Proposals for Amendments to the Take-over Bid Sections of the Canada Business Corporations Act* (1983).

314. See, e.g., Review Committee, *supra*, note 183, at 246E ("striking"; recommend national policy to permit accelerated treatment of routine orders during bid). The Quebec Commission has granted exemptions for takeover bid circulars from the French language requirements apparently on the basis of the number of offerees in the province; see *Robert L. Wilson*, 15 *Q.S.C. Bull.* 2.1.2 and 2.1.4 (February 24, 1984) (exemption for takeover and directors' circulars; 9 Quebec offerees holding under 3 percent); *Northwestern Utilities Ltd.*, 15 *Q.S.C. Bull.* 2.1.9 (May 18, 1984); *Pagebrook Realco Partnership*, 15 *Q.S.C. Bull.* 2.1.8 (April 20, 1984) (57 offerees; denied exemption); see also *Halifax Developments Holdings Ltd.*, 14 *Q.S.C. Bull.* 2.1.1 (August 5, 1983) (takeover bid prohibited because material omissions and not in French).

315. See, e.g., Notice: Public Meeting — Take-over Bid Report, 6 *O.S.C. Bull.* 4183 (December 2, 1983) (securities administrators "must work together to eliminate or minimize legislative inconsistencies between jurisdictions to ensure effective regulation of inter-provincial securities transactions"); Notice: Consensus on Amendments to Take-over Bid — Issuer Bid Rules, 7 *O.S.C. Bull.* 1415 (March 30, 1984) (administrators of Alberta, British Columbia, Ontario and Quebec). See also Notice of Public Meeting to Discuss "Take-over" Legislation, *A.S.C. Summary* (April 27, 1984), 2 (meeting to consider proposals for uniform legislation based on draft sent by O.S.C.).

316. See *supra*, note 38.

317. See, e.g., *In re a Take-over Bid by CSR Holdings Inc.*, 6 *O.S.C. Bull.* 4193 (December 2, 1983) (time requirements of provincial acts); *Exco Corp. Ltd.*, 14 *Q.S.C. Bull.* 2.1.6 (August 12, 1983) (withdrawal period); *In re Northwestern Utilities Ltd.*, 7 *O.S.C. Bull.* 2251 (May 25, 1984), 7 *O.S.C. Bull.* 2356 (June 1, 1984) (conditions permitted in Alberta and Saskatchewan allowed where fewer than 5 percent of offerees in Ontario).

318. See, e.g., *In re Agassiz Resources Ltd.*, 6 *O.S.C. Bull.* 2147 (July 22, 1983) (Alberta Stock Exchange bid for shares of reporting issuer in Ontario); *Agassiz Resources Ltd.*, 14 *Q.S.C. Bull.* 2.1.1 (July 29, 1983) (A.S.E. rules equivalent to those of M.E. and T.S.E.); *Ican Resources Ltd.*, *A.S.C. Summary* (June 17, 1983), 12 (coordination with B.C.); *Harbour Petroleum Co. Ltd.*, *B.C. Corp., Fin. & Reg. Services Weekly Summary* (January 7, 1983), 12 (with Alberta); *In re National Resources Explorations Ltd.*, 4 *O.S.C. Bull.* 262B (November 5, 1982) (exemption conditional on exemptions in other provinces).

    In view of the importance of exemption orders to the coordination process, it is significant that the exempting powers under the statutes still differ. The British Columbia and Saskatchewan Acts and the Canada Business Corporations Act require an application to a court; the remainder permit the commission to exempt a bid; see, e.g., B.C. Securities Act, s. 88; Ontario Securities Act, s. 99. But see Coleman *et al.*, *supra*, note 26, at 27–28 (ss. 100c and 100d; applications to court and commission).

319. See, e.g., *In re Trans Mountain Pipe Line Co. Ltd.*, 4 *O.S.C. Bull.* 553C (December 17, 1982), varied 5 *O.S.C. Bull.* 5C (January 14, 1983); see also *Inland Natural Gas Co. Ltd.*, *A.S.C. Summary* (January 7, 1983), 27 (extending bid); *cf. In re British Columbia Forest Products Ltd.*, 2 *O.S.C. Bull.* 6C (July 24, 1981).

320. See *In re Exco Corp. Ltd.*, 6 *O.S.C. Bull.* 3263 (October 7, 1983) (denying exemption).

321. See Notice: Consensus on Amendments, *supra*, note 314, at 1418.

322. See Anisman and Hogg, *supra*, note 4, at 141. The attack was particularly effective because the Canadian stock exchange rules precluded such a purchase campaign in Canada and the other bidders were prohibited from buying at all in the United States as a result of their announcements; see *supra*, note 312; and see Rule 10b-13 under the U.S. Securities Exchange Act of 1934.

323. See Notice I: Request for Comments on Exemption for Take-over Bids effected through a Stock Exchange, O.S.C. Weekly Summary, July 21, 1978, 2A, at 3A; *cf.* Anisman, *supra*, note 14, at 51–57.

324. See *In re Brascan Ltd.*, [1979] *O.S.C. Bull.* 108 (May) (denying exemption); *Brascan Ltd. v. Edper Equities Ltd.* (1979), 477 F. Supp. 773 (S.D.N.Y.) (purchases legal under United States law).

325. See Ont. Reg. 310/79; Regulation 310/79 as to Exemption from Take-over Rules through a Stock Exchange or Over-the-Counter Market, [1979] *O.S.C. Bull.* 122 (May).

326. See, e.g., Notice I, *supra*, note 323; see also *In re Aurora Energy Funds Ltd.*, 4 *O.S.C. Bull.* 130B (August 27, 1982) (purchases in reporting issuer through Vancouver Exchange granted exemption).

327. See *In re Electra Investments (Canada) Ltd.*, 6 *O.S.C. Bull.* 417 (April 8, 1983) (shares purchased on M.E. sold by Ontario shareholders). At the time the Montreal Exchange had not been recognized for purposes of exempt takeover bids by the Ontario Commission. The Commission's decision is under appeal, *inter alia*, on the constitutional issue. *Cf. O.S.C. v. Electra Investments (Canada) Ltd.* (unreported Ont. H.C. 1983) (denying compliance order).

328. See, e.g., Alberta Stock Exchange, Bylaws, Part XXI, 4 *CCH Can. Sec. L. Rep.* paras. 80-717 ff.; and see *supra*, note 312. See also Ontario Policy No. 3.1, ss. E.2–4, 3 *CCH Can. Sec. L. Rep.* para. 54-917 (recognizing A.S.E., M.E. and T.S.E.; V.S.E. recognized if offeror complies with specified conditions). The Ontario policy states that the three recognized exchanges informed it that their rules meet the conditions specified, but the changes have not been included in the *CCH Can. Sec. L. Rep.* as of August 1984. The conditions are included, however, in the interim rules adopted in June 1984; see Notice: Stock Exchange Take-over Bids, *supra*, note 312. See also Alberta Policy No. 3-13, *supra*, note 82 (A.S.E., M.E. and T.S.E.); Decision No. 6812, 14 *Q.S.C. Bull.* 2.1.16 (April 8, 1983) (M.E., T.S.E. and V.S.E.); Notice re Stock Exchange Take-over Bids, 2 *CCH Can. Sec. L. Rep.* para. 29-976 (B.C.).

329. In Alberta, Ontario and Quebec as the exemption in their legislation is contingent on recognition by the commissions; see, e.g., Quebec Securities Act, s. 116(1).

330. But *cf.* Proposed New Securities Act, 7 *O.S.C. Bull.* 3419 (August 10, 1984) (s. 89(1)(e): exemption if fewer than 50 Ontario offerees holding less than 2 percent of the class of securities sought). The proposed exemption appears not to be directed at purchases on stock exchanges without stock exchange takeover bid rules, for it is conditional on the mailing of information required in a recognized jurisdiction. The commentary to the section does not address this issue. *Cf.* also, e.g., *supra*, note 279 and accompanying text.

331. See, e.g., Anisman and Hogg, *supra*, note 4, at 149; see also *In re Atco Ltd.*, [1980] *O.S.C. Bull.* 412, at 425–29 (September) (Commissioner Thom, dissenting).

332. *Cf.* Dey, Opening Statement: Panel on Extraterritorial Application of Securities Laws — Law Institute of the Pacific Rim, 6 *O.S.C. Bull.* 3481, at 3482 (October 21, 1983).

333. See, e.g., Saskatchewan Securities Act, s. 88(b)(i); see also, e.g., Anisman, *supra*, note 14, at 37–44.

334. See *O.S.C. Disclosure Report*, *supra*, note 17, at 91–92; Select Committee on Company Law, *supra*, note 51, at 28–32. The background to the provision is described more fully in Bailey and Crawford, *supra*, note 44, at 109–17. The "compromise" apparently was the premium.

335. See Ontario Securities Act, ss. 88(2)(c) and 91(1); Ontario Securities Regulation, s. 163.

336. See Ontario Securities Act, ss. 88(1)(f) and (k) ("offeree" and "take-over bid" respectively defined in terms of security holders whose address "on the books of the offeree company is in Ontario").

337. See *O.S.C. Weekly Summary* (April 7, 1978), Supp. X (amendments to Bill 7).

338. See Ontario Securities Act, ss. 88(1)(l) and 91(1). No such "uniform act province" has been designated.

339. See Ontario Securities Act, s. 129. For general considerations of administration of the follow up scheme see Bailey and Crawford, *supra*, note 44; Subcommittee on Cana-

dian Securities Laws, *Canadian Securities Legislation and the Sale of Control: A Report to the State Regulation of Securities Committee of the Section on Corporation, Banking and Business Law of the American Bar Association* (September 1982). (The committee members were John F.T. Warren, Philip Anisman and James W. Surbey.)

340. See Alberta Securities Act, s. 132(1)(c).

341. See Quebec Securities Act, s. 116(2); Quebec Securities Regulation, s. 187. The Quebec Commission has adopted a policy establishing guidelines for exemptions from the statutory requirement where the premium is greater than the specified 15 percent; interestingly one basis for obtaining an exemption is an undertaking by the purchaser to make a follow up offer like that required under the Ontario Act; see Quebec Policy No. Q-2, 3 *CCH Can. Sec. L. Rep.* para. 65-002. (The follow up offer is specified in ss. 1(2) and 5 of the Policy.) Only one exemption has been granted; see *Aur Resources Inc.*, 14 *Q.S.C. Bull.* 2.1.1 (December 9, 1983) (no takeover bid required).

    For an optimistic assessment (unduly so in the light of hindsight) of the likelihood of other provinces accepting the follow up provision see Knowles, *1982 Report of the Chairman*, 4 *O.S.C. Bull.* 620Aii, at 638A (December 31, 1982).

342. See, e.g., Knowles, *supra*, note 45.

343. See *In re Atco Ltd.*, [1980] *O.S.C. Bull.* 412 (September).

344. See *In re 94136 Canada Inc.*, *O.S.C. Weekly Summary* (May 30, 1980), 10A.

345. See also, e.g., *In re Conoco, Inc.*, 1 *O.S.C. Bull.* 152B (May 22, 1981) (takeover bid); *In re Hudson's Bay Oil and Gas Co. Ltd.*, 2 *O.S.C. Bull.* 44C (September 25, 1981) (exemption from follow up offer provision).

346. The decision has been criticized on its merits and for inconsistent application of the criteria enunciated in the Commission's single earlier decision; see Subcommittee on Canadian Securities Laws, *supra*, note 339, at 7–8; Bailey and Crawford, *supra*, note 44, at 145–47.

347. See *In re Universal Explorations Ltd.*, 2 *O.S.C. Bull.* 33D (November 6, 1981) (temporary cease trading order to prevent amalgamation); 2 *O.S.C. Bull.* 52D (November 20, 1981) (extension of temporary order denying exemptions); *In re Universal Explorations (81) Ltd.*, 2 *O.S.C. Bull.* 55D (November 20, 1981) (temporary cease trading order); 2 *O.S.C. Bull.* 57D (November 20, 1981) (temporary denial of exemptions); 2 *O.S.C. Bull.* 59D (November 20, 1981) (notice of hearing). The decision is discussed in Subcommittee on Canadian Securities Laws, *supra*, note 339, at 16–17; Bailey and Crawford, *supra*, note 44, at 134–36. The approval of the amalgamation required under the Alberta Companies Act, although initially denied by the Alberta courts, was ultimately received; see *Harris v. Universal Explorations Ltd.* (1982), 17 Bus. L.R. 135 (Alta. C.A.).

    See also *In re Caisse de dépôt et placement du Québec*, 4 *O.S.C. Bull.* 498C (November 12, 1983) (denial of exemptions). The order was reversed because the Ontario Act does not apply to Crown agents; see *Re Caisse de dépôt et placement du Québec* (1983), 42 O.R. (2d) 561 (Div'l Ct.); see also Press Release: OSC Settlement with Caisse de Dépôt, 7 *O.S.C. Bull.* 3101 (July 20, 1984).

348. See, e.g., Baillie, "Shareholders Remedies", in Law Society of Upper Canada, *Special Lectures: New Developments in the Law of Remedies* (Richard de Boo, 1981), 21, at 32 (for "applying its rule nationally even though no other province has a similar rule"); Subcommittee on Canadian Securities Laws, *supra*, note 339, at 17; Bailey and Crawford, *supra*, note 44, at 144. See also Coleman, Emerson, and Jackson, *Interim Report*, 2 *O.S.C. Bull.* 213A, at 236A–38A (November 27, 1981); *cf. Securities Industry Committee Report*, *supra*, note 27, at 47.

349. See *In re Humboldt Energy Corp.*, 5 *O.S.C. Bull.* 8C (February 25, 1983) (purchase of 2.5 percent of shares of Alberta issuer, reporting in Ontario but not listed on Toronto Exchange, from Swiss corporation where 33 percent of shares held by Ontario residents); see also Bailey and Crawford, *supra*, note 44, at 132–33.

350. See, e.g., Dey, Extracts from Remarks to the Society of Financial Analysts, 6 *O.S.C. Bull.* 1313, at 1319 (June 3, 1983).

351. See Coleman *et al.*, *supra*, note 26, at 15–18; *Securities Industry Committee Report*,

supra, note 27, at vii–viii; and see Notice: Consensus on Amendments, *supra*, note 315, at 1416.

352. See *supra*, note 341. Nova Scotia Securities Act, 1984, ss. 76(1)(c) and 77 adopt the provisions in Coleman *et al.*, *supra*, note 26, ss. 89(1)(c) and 90. The proposed Ontario amendments adopt the same general approach but contain differences of detail; they exempt purchases from no more than five sellers and do not exempt purchases by a person with legal control, that is, over 50 percent of the voting shares; see Proposed New Securities Act, 7 *O.S.C. Bull.* 3419 (August 10, 1984) (s. 89(1)(c)). Moreover the definition of takeover bid would remain at the 20 percent figure. The Nova Scotia Act reduces the percentage to ten (s. 75(1)(p)) and permits a private purchase from up to fourteen people as does the Quebec Securities Act, s. 116(2). The new legislation in Nova Scotia and Ontario would apply to offers to residents of the province and to offers that occur in the province. See also *supra*, note 330. Despite the announced agreement among the provincial administrators, Alberta Bill 55 contains no similar provisions.
353. *In re Humboldt Energy Corp.*, *supra*, note 349, at 9C.
354. See, e.g., Dey, *supra*, note 332, at 3487; Dey, *supra*, note 350, at 1319.
355. See *In re Universal Explorations Ltd.*, 7 *O.S.C. Bull.* 2027 (May 11, 1984) (reasons); 7 *O.S.C. Bull.* 1425 (March 30, 1984) (order); see also *supra*, note 347.
356. See ibid., at 2028 and 2030. The press release, which was filed with the Commission, stated that Universal had undertaken to make an equivalent offer through an amalgamation.
357. Ibid., at 2032.
358. *Cf. Re Turbo Resources Ltd.* (1982), 137 D.L.R. (3d) 264 (Ont. Div'l Ct.) (undertaking given to Commission in hearing).
359. See *Securities Industry Committee Report*, *supra*, note 27, at 47; and see, e.g., Bailey and Crawford, *supra*, note 44, at 165.
360. See Knowles, "Private Agreements for Takeover of Public Companies: Canada", [1984] *Int. Bus. Law*. 207, at 210 (follow up offer might have worked if Canada had federal securities commission); see also *supra*, note 352. And see Knowles, *supra*, note 45, at 84A (lack of uniform requirement produces "ridiculous result" for nationally held securities).
361. See Avis: Placement, pendant la durée d'une offre publique, de titres de la société visée, 15 *Q.S.C. Bull.* 1.2.2 (April 6, 1984) (intention to propose adoption of national policy at meeting of Canadian Securities Administrators in May 1984). A proposed national policy has not been published or otherwise publicly mentioned.
362. See Notice: Consensus on Amendments, *supra*, note 315, at 1417 (Alberta, British Columbia, Ontario and Quebec administrators agreed to consider draft policy "at next full Canadian Securities Administrators' meeting"). The meeting of the four administrators took place on January 17, 1984.
363. Request for Comments: Regulation of Target Company Defensive Tactics, 7 *O.S.C. Bull.* 1335, at 1337 (March 23, 1984). The request suggests as well that regulation of defensive tactics may require changes in the time periods imposed by the Securities Act.
364. Similar issues relating to interprovincial cooperation are raised by the treatment of non-voting and "restricted voting" shares; see *supra*, notes 95 and 96 and accompanying text. The proceedings leading up to the adoption of the initial policy governing the use of such shares, which imposed only detailed disclosure requirements, are outlined in Anisman, *supra*, note 5, at 355 n. 154. Although the Alberta and Manitoba administrators participated, only British Columbia, Ontario and Quebec adopted the policy. The additional blue sky requirements described in the text, *supra*, at notes 95 and 96, have been adopted on an interim basis by Ontario and Quebec, and British Columbia has indicated its agreement to them. The immediate effectiveness of these new elements might be questioned in view of the commissions' recognition that the issues involved transcend provincial boundaries and the concern over the extraterritorial impact of the new policies that has led the Ontario Commission's chairman to emphasize that there will be consultation with the other provincial administrators

before final action is taken; see O.S.C., Position Paper: Draft and Interim Policy on Restricted Shares and Request for Comments, 7 *O.S.C. Bull.* 988 (March 2, 1984) (s. III.B: cooperation needed among provincial administrators and provincial and federal governments); Dey, Notes for Remarks to the Toronto Society of Financial Analysts, 7 *O.S.C. Bull.* 2463 (June 8, 1984).

365. See, e.g., *Securities Industry Committee Report*, *supra*, note 27, at 47.

366. See *supra*, note 28 and accompanying text. See now, e.g., Ontario Securities Act, s. 121; Quebec Securities Act, s. 213.

367. See Bray, *supra*, note 13, at 240–41.

368. See, e.g., Ontario Securities Act, s. 11; *cf.* 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 14.01; 2 ibid., at 304–308. And see generally Baillie, "Discovery-Type Procedures in Security Fraud Prosecutions" (1972), 50 *Can. B. Rev.* 496. Although information obtained in a formal investigation is confidential, the Commission may consent to its release and presumably would ordinarily do so for enforcement reasons; see, e.g., Ontario Securities Act, s. 14; *cf.* Alboini, *supra*, note 173, at 154 and 167–68.

369. See, e.g., Nicholas, *supra*, note 5, at 20 (O.S.C. Enforcement Branch "compelled to seek the assistance and co-operation of securities commissions and other law enforcement organizations located outside the province").

370. See, e.g., *In re Intercon Petroleum Inc., A.S.C. Summary* (August 19, 1983), 2 (evidence of mismanagement of registrant not the subject of proceedings to be sent to Superintendant in British Columbia); British Columbia Policy No. 3-38, s. 4, 2 *CCH Can. Sec. L. Rep.* para. 29-997e; see also Leigh, "Securities Regulation: Problems in Relation to Sanctions", in 3 *Canada Securities Market Proposals*, *supra*, note 4, 509, at 619 (cooperation with S.E.C.).

371. See, e.g., Bray, *supra*, note 13, at 241. The power to issue "freeze orders" is not only limited to the province, but the commissions must specify a particular branch if the funds in question are held by a bank or a loan or trust company; see, e.g., Ontario Securities Act, s. 16. Compare 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 14.05; 2 ibid., at 316 (service of order on head office of bank requires national compliance).

372. See National Policy No. 17, 3 *CCH Can. Sec. L. Rep.* para. 54-854; see also, e.g., Leigh, *supra*, note 370, at 621 (O.S.C. contacts Interpol for criminal data).

373. See, e.g., Ontario Securities Act, ss. 60, 123 and 124; *cf.* 1 *Canada Securities Market Proposals*, *supra*, note 40, ss. 5.09 and 14.04; 2 ibid., at 311–14.

374. See *supra*, notes 121 and 122 and accompanying text.

375. See, e.g., Interpretation Note 2, 6 *O.S.C. Bull.* 4536 (December 22, 1983) (identity of insider unknown to issuer); *Gaz Metropolitain, Inc.*, 3 *O.S.C. Bull.* 5A (January 8, 1982) (notice of hearing: prospectus refused because insider, Caisse de dépôt, failed to file insider reports); *In re Gaz Metropolitain, Inc.*, 3 *O.S.C. Bull.* 33B (January 15, 1982) (undertaking by Quebec minister to amend laws to require Caisse to report; order withdrawn).

376. The Commission's action concerning Gaz Metropolitain was criticized as ineffective and potentially harmful to the issuer's minority shareholders; see Anisman, *supra*, note 5, at 354 n. 149.

377. See, e.g., *Black v. Doherty McCuaig Ltd.*, [1974] 4 W.W.R. 342 (B.C.S.C.); *In re Bralorne Resources Ltd.*, [1976] *O.S.C. Bull.* 258 (September); *In re Universal Explorations Ltd.*, 7 *O.S.C. Bull.* 2027 (May 11, 1984) (cease trading order not issued because harmful to Ontario shareholders).

378. See, e.g., *In re Certain Securities*, *A.S.C. Summary* (June 8, 1984), 4 (order concerning specified missing securities issued day following similar order in B.C.); but see *MSM Marketing Ltd.*, 7 *O.S.C. Bull.* 1911 (May 4, 1984) (order rescinded in Alberta but not in Ontario).

379. See Ontario Policy No. 1.4, *supra*, note 153.

380. See, e.g., *In re Unlisted Securities*, 4 *O.S.C. Bull.* 227B (October 29, 1982); 4 *O.S.C. Bull.* 73D (October 29, 1982) (order prohibiting trading in securities not listed on a

Canadian stock exchange and in securities that are interlisted on both a Canadian and a foreign exchange preceding announcement by Minister of Finance). As the Canadian exchanges would halt trading through their facilities, the purpose of the Commission's order was to preclude trading elsewhere until the Minister's statement had been disseminated.

381. See, e.g., *supra*, notes 347 and 348 and accompanying text; see also, e.g., *In re Highfield Property Investments Ltd.*, 3 *O.S.C. Bull.* 307A (May 14, 1982) (notice of hearing concerning cease trading order issued because of squeeze out amalgamation of Alberta corporations one of which was listed on Toronto Stock Exchange contrary to Ontario "going private" policy); 3 *O.S.C. Bull.* 324B (May 14, 1982) (notice of hearing on order denying exemptions); 3 *O.S.C. Bull.* 327B (May 14, 1982) (temporary order denying exemptions); 3 *O.S.C. Bull.* 49D (May 14, 1982) (temporary cease trading order); 3 *O.S.C. Bull.* 331B (May 21, 1982) (temporary denial of exemptions); 3 *O.S.C. Bull.* 51D (May 21, 1982) (temporary cease trading order); 4 *O.S.C. Bull.* 24D (July 23, 1982) (orders rescinded when amalgamation dropped). For an example of an exemption denial order to penalize improper conduct without any extraterritorial aspect see *In re Moore*, [1979] *O.S.C. Bull.* 141 (June) (improper insider trading).

382. See *In re Connor*, [1976] *O.S.C. Bull.* 149 (June).

383. Baillie and Alboini, "The National Sea Decision — Exploring the Parameters of Administrative Discretion" (1978), 2 *Can. Bus. L.J.* 454, at 461.

384. *In re Kaiser Resources Ltd.*, 1 *O.S.C. Bull.* 13C, at 14C (April 10, 1981).

385. Ibid., at 15C. See also, e.g., *In re Clark*, 2 *O.S.C. Bull.* 442C (November 20, 1981) (insider trading and tipping in British Columbia).

386. See Nicholas, *supra*, note 5, at 50–52; see also *In re Caisse de dépôt et placement du Québec*, 4 *O.S.C. Bull.* 498C, at 513C (November 12, 1982); and see *supra*, note 121 and accompanying text. The Commission's approach has been dubbed the "sandbox theory"; see *Securities Industry Committee Report*, *supra*, note 27, at 74 n. 77.

387. See Subcommittee on Canadian Securities Laws, *supra*, note 339, at 16–17.

388. See *supra*, notes 375 and 376.

389. See *In re Caisse de dépôt et placement du Québec*, 4 *O.S.C. Bull.* 290B (November 5, 1982) (order); 4 *O.S.C. Bull.* 498C (November 12, 1982) (reasons). See also *supra*, note 347.

390. See, e.g., Bailey and Crawford, *supra*, note 44, at 130–31.

391. See Quebec Securities Act, s. 4; Bill 109, An Act to Amend the Securities Act, Ontario, 32d Legis., 4th Sess., June 18, 1984 (1st Reading).

392. See *In re Caisse de dépôt et placement du Québec*, 7 *O.S.C. Bull.* 3110 (July 20, 1984). The agreement between the Commission and the Caisse is appended to the Commission's order; see ibid., at 3111. The Caisse agrees to comply with the Ontario Act only until the end of 1984; if the amending bill has not been enacted by then, the agreement may be terminated on 60 days' written notice. Pursuant to the agreement the Commission withdrew its appeal from the reversal of its earlier decision; see *supra*, note 347.

393. See Quebec Securities Act, s. 4. A "crown insider" must report within ten days of the end of the month in which it obtains the requisite holding and within ten days of the end of the month in which its holdings change by more than 1 percent; otherwise it may report changes within 60 days after the end of the year in which they occur. Compare *supra*, note 138 and accompanying text.

The Quebec government has presumably determined not to extend the application of the Securities Act to the Crown; *cf.* 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 16.15.

394. See Bill 109, *supra*, note 391, s. 1. While Crown agents would be exempt from the Commission's powers to issue freeze orders and apply for the appointment of a receiver, they would be subject to all of the other avenues of enforcement except criminal prosecution and actions for damages. It is difficult to see a justification for the exclusion of the latter; see 2 *Canada Securities Market Proposals*, *supra*, note 40, at 26 and 396.

395. See, e.g., *In re Manitoba Properties Inc.*, 7 *O.S.C. Bull.* 2785 (June 29, 1984); *A.S.C.*

Summary (June 22, 1984), 17; 15 *Q.S.C. Bull.* 5.2.2 (June 22, 1984) (applications for exemptions from prospectus and resale requirements); *In re B.C. Rail Ltd.*, 7 *O.S.C. Bull.* 2479 (June 8, 1984); *A.S.C. Summary* (June 1, 1984), 10; 15 *Q.S.C. Bull.* 5.2.1 (June 8, 1984); *In re Manalta Coal Ltd.*, 6 *O.S.C. Bull.* 1327 (June 3, 1983); *A.S.C. Summary* (March 25, 1983), 6; 14 *Q.S.C. Bull.* 5.2.1 (April 1, 1983).

396. See *supra*, text accompanying notes 109 to 115.

397. See, e.g., Avis, *supra*, note 115, at 1.2.6 (remedy to be available only under Quebec Act in Quebec courts); see also, e.g., Quebec Securities Act, s. 221.

398. See *supra*, note 60.

399. See, e.g., Ontario Securities Act, ss. 126, 127 and 131.

400. Compare, e.g., Ontario Securities Act, s. 126 and B.C. Securities Act, s. 141. The latter section imposes liability for a false prospectus only on directors of the issuer who bear the burden of proving their diligence; for an analysis of its deficiencies see Anisman, *supra*, note 14, at 324–26. The newer Ontario section extends liability to issuers, selling security holders, underwriters and experts who consent to the inclusion of their opinions but leaves the onus of proving a lack of diligence by anyone other than the issuer or selling security holder on a plaintiff. As a plaintiff must purchase a security in the distribution, the maximum amount of liability is determined by the number of securities sold under a prospectus; see, e.g., Ontario Securities Act, s. 126(9); *cf.* ss. 126(6)–(7). See also 2 *Canada Securities Market Proposals*, *supra*, note 40, at 251–56. And see *supra*, note 109 (insider trading).

401. See, e.g., *Blackie v. Barrack* (1975), 524 F.2d 891 (9th Cir.) (filings); *Mitchell v. Texas Gulf Sulphur Co.* (1971), 446 F.2d 90 (10th Cir.) (press release); *In re LTV Securities Litigation* (1980), 88 F.R.D. 134 (N.D. Tex.) (scheme to inflate price of security through misrepresentations).

402. See, e.g., *supra*, notes 111, 113 and 114 and accompanying text.

403. It might be reasonable, however, for a province creating liability and imposing a ceiling to rely on the fact that an action for damages for misrepresentation in the marketplace is not clearly available at common law; see, e.g., *Bedford v. Bagshaw* (1859), 4 H. & N. 538, 157 E.R. 951 (Exch.); *Barry v. Croskey* (1861), 2 J. & H. 1, 70 E.R. 945 (Ch.); *Peek v. Gurney* (1873), L.R. 6 H.L. 377; *Andrews v. Mockford*, [1896] 1 Q.B. 372 (C.A.). Actions in provinces without a statutory remedy would therefore be unlikely.

404. *Cf.*, e.g., 2 *Canada Securities Market Proposals*, *supra*, note 40, at 249–51 (coordination of actions). The need for such coordination derives from constitutional as well as procedural limitations, for a province cannot preclude an action for damages in another jurisdiction.

405. See, e.g., ibid., at 251 (consult with Canadian Judicial Council to develop procedure).

406. See *supra*, notes 73 and 74 and accompanying text. Nevertheless, it is possible to avoid the registration requirements by carrying on a business exclusively with respect to trades and securities that are exempt; see *infra*, text accompanying note 429 and following.

407. See, e.g., Connelly, *supra*, note 71, at 1297–98 ("greatest weakness in the provincial system of licensing").

408. See, e.g., Ontario Securities Act, s. 31. The constitutional validity of these provisions has been questioned; see, e.g., Nicholas, *supra*, note 5, at 36. *Cf. Canadian Charter of Rights and Freedoms*, s. 6.

409. See, e.g., Connelly, *supra*, note 71, at 1298–99; Williamson, *supra*, note 6, at 50; note 11, at 21. The Manitoba Securities Act, s. 14 requires one officer or director of a corporation and one partner or member of a partnership to be a provincial resident.

410. See Joint News Release, 4 *O.S.C. Bull.* 437A (November 19, 1982). The uniform form is included as Form 4 in Alberta, British Columbia and Ontario, Form 3 in Quebec, Form 2 in the Yukon Territory and Form 1 in the Northwest Territories. It is not included in the sections for the other provinces in the *CCH Can. Sec. L. Rep.*

411. See National Policy Nos. 16–18, 3 *CCH Can. Sec. L. Rep.* paras. 54-853–54-855. National Policy No. 16 requires that records of all local trading be maintained in a

branch office of a registrant in a province other than the one in which its head office is located. National Policy No. 17 deals with the effect of violations on continued fitness for registration; see *supra*, note 372 and accompanying text. And the last Policy concerns conflicts of interest resulting from corporate directorships held by a registrant.

412. See, e.g., Joint News Release, *supra*, note 410; Ontario Securities Regulation, ss. 102 (know your client rules) and 110–111 (educational requirements). See also, e.g., *In re Investment Funds Institute of Canada*, *A.S.C. Summary* (May 18, 1984), 25; 15 *Q.S.C. Bull.* 2.1.1 (March 9, 1984) (exemption from confirmation requirements).

413. See, e.g., Joint News Release, *supra*, note 410; see also *Netpro Report*, *supra*, note 217, para. 2.02(c) (recommending uniform national educational, supervisory and licensing standards); *In re Trading in Recognized Options cleared through Recognized Clearing Organizations*, 7 *O.S.C. Bull.* 2685 (June 22, 1984).

414. See *supra*, note 370 and accompanying text. The commissions are also increasingly prepared to delegate these matters to the self-regulatory organizations; see, e.g., Joint News Release, *supra*, note 410; Decision No. 7065, 15 *Q.S.C. Bull.* 2.1.2 (March 30, 1984) (delegate registration to Montreal Exchange, including questions relating to residence requirement); Decision 84-E-1116, 15 *Q.S.C. Bull.* 7.2.1 (August 3, 1984) (exempt member of M.E. from notice requirement for change of officer who lives in Ontario if is reciprocal treatment by T.S.E.).

415. See Alberta Policy No. 3-21, s. 1.2(a), 2 *CCH Can. Sec. L. Rep.* para. 24-521; British Columbia Policy No. 3-38, *supra*, note 370; Ontario Policy No. 4.7, 3 *CCH Can. Sec. L. Rep.* para. 54-927; Quebec Policy No. Q-9, *supra*, note 76, s. 56; Saskatchewan Policy No. 3-08, 3 *CCH Can. Sec. L. Rep.* para. 69-308. See also, e.g., *Davidson Partners Ltée*, 15 *Q.S.C. Bull.* 2.1.17 (April 13, 1984); Dispenses, 15 *Q.S.C. Bull.* 7.2.1 (July 27, 1984) (seven salesmen). The British Columbia and Ontario policies are more general and therefore include salesmen in the category described in the text.

416. See Alberta Policy No. 3-21, *supra*, note 415, s. 1.2(b) (employees of members of Investment Dealers Association of Canada); British Columbia Policy No. 3-38, *supra*, note 370 (member of T.S.E., A.S.E., M.E. or I.D.A.C.); Ontario Policy No. 4.7, *supra*, note 415. See also *In re McLeod Young Weir Ltd. Two Pools*, *A.S.C. Summary* (July 27, 1984), 7 (pools sold by employees in Toronto office); *B.C. Corp., Fin. & Reg. Services Weekly Summary* (June 15, 1984), 16.

417. See British Columbia Policy No. 3-38, *supra*, note 370, s. 1; *cf.* Review Committee, *supra*, note 183, at 246E.

418. See, e.g., ibid.

419. See, e.g., *In re First Reserve Securities Inc.*, 7 *O.S.C. Bull.* 2350 (June 1, 1984) (B.C. registrant selling units of Alberta corporation); *In re Canarim Investments Corp. Ltd.*, 4 *O.S.C. Bull.* 175B (September 24, 1982) (registered in B.C., Alta., Sask., Man. and Yukon); *In re Sanderson Securities Ltd.*, 6 *O.S.C. Bull.* 3954 (November 18, 1983) (Sask. registrant).

420. See *In re First Reserve Securities Inc.*, *A.S.C. Summary* (May 18, 1984), 10.

421. See *In re Leith Wheeler Mgt. Ltd.*, 7 *O.S.C. Bull.* 3103 (July 20, 1984).

422. See ibid.; see also, e.g., *In re M.K. Wong & Associates Ltd.*, 3 *O.S.C. Bull.* 240B (March 19, 1982); *In re Canagex Placements Ltée*, 4 *O.S.C. Bull.* 170B (September 24, 1982) (Quebec); *In re Pragma Inc.*, 4 *O.S.C. Bull.* 385B (December 24, 1982), varied 7 *O.S.C. Bull.* 3311 (August 3, 1984) (Texas registrant). And see Quebec Policy No. Q-9, *supra*, note 76, ss. 53–54.

423. See, e.g., *supra*, note 417.

424. See *Report of the Committee to Study the Requirements and Sources of Capital and the Implications of Non-Resident Capital for the Canadian Securities Industry* (Trevor F. Moore, Chairman, 1970) [hereinafter *Moore Report*]. The acquired firm was Royal Securities Corporation Limited.

425. See, e.g., Report to the Minister regarding Institutional Ownership and Diversification, *supra*, note 76.

426. See, e.g., ibid.; La Propriété et la diversification des firmes de courtage, *supra*, note 76.

427. See, e.g., *O.S.C. Discount Brokerage Report*, *supra*, note 78; Avis, *supra*, note 78.

428. See, e.g., Ontario Securities Act, ss. 34(1)3–5.

429. See Notice: Policy Review, *supra*, note 79.

430. See also, e.g., *Report of the Study Committee on Financial Institutions* (Jacques Parizeau, Chairman, Govt. of Quebec, 1969); *Study on the Securities Industry in Quebec: Interim Report* (Dept. of Financial Institutions, Companies and Co-operatives, 1971); *Study on the Securities Industry in Quebec: Final Report* (Louis-Phillippe Bouchard, Chairman, Dept. of Financial Institutions, Companies and Co-operatives, 1972) [hereinafter *Bouchard Final Report*]; *Report of the Securities Industry Ownership Committee of the Ontario Securities Commission* (O.S.C., 1972); Economic Council of Canada, *Efficiency and Regulation: A Study of Deposit Institutions* (Minister of Supply and Services Canada, 1976); *Report to the Minister of Consumer and Commercial Relations on the Application of Ontario Securities Legislation to Non-Resident Securities Firms not Currently Registered in Ontario*, [1979] *O.S.C. Bull.* 420 (December); 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 8.02; 2 ibid., at 134 and 160–61. For overviews of the period see Connelly, *supra*, note 71, at 1380–92; Williamson, "Canadian Financial Institutions", in 3 *Canada Securities Market Proposals*, *supra*, note 4, at 719.

431. See, e.g., Notice: Institutional Ownership of, and Diversification by, Securities Dealers, 3 *O.S.C. Bull.* 323A (May 21, 1982); 3 *O.S.C. Bull.* 330A (June 4, 1982) (submissions to be sent to all administrators); *O.S.C. Discount Brokerage Report*, *supra*, note 78, App. C. (B.C., Alta., Sask., Man. and Quebec); Notice: Canadian Securities Administrators' Press Release, 6 *O.S.C. Bull.* 3929 (November 18, 1983).

432. See, e.g., Toronto Stock Exchange Bylaws, Parts V–VI; see also, e.g., *In re Baker Weeks of Canada Ltd.*, [1977] *O.S.C. Bull.* 32 (February); *In re Reynolds Securities (Canada) Ltd.*, 9 *Q.S.C. Bull.* 1 (March 7, 1978); *La Propriété et la diversification des firmes de courtage*, 14 *Q.S.C. Bull.* 2.1.1, at 2.1.20 (June 17, 1983) (order that Montreal Exchange alter rules).

433. See, e.g., Connelly, *supra*, note 71, at 1385–87; Williamson, *supra*, note 430, at 803–804.

434. See *Bouchard Final Report*, *supra*, note 430, at 132–35 (25 percent minimum Quebec ownership).

435. See, e.g., *In re Reynolds Securities (Canada) Ltd.*, *supra*, note 432.

436. See Quebec Policy No. Q-9, *supra*, note 76, s. 9(5).

437. See, e.g., Quebec Securities Regulation, s. 228(3) (notice of insiders).

438. See, e.g., *In re Reynolds Securities (Canada) Ltd.*, [1978] *O.S.C. Bull.* 101 (March) (refusing approval of transfer of control); see also *In re Bache Halsey Stuart Canada Ltd.*, 2 *O.S.C. Bull.* 493C (December 4, 1981) (approving transfer of control as continued registration in public interest but refusing to overturn Toronto Stock Exchange decision to contrary). And see Saskatchewan Policy No. 3-07, *supra*, note 77 (adopted August 1972).

439. See *Report to the Minister of Consumer and Commercial Relations*, *supra*, note 430, at 436–40 (three year review); Knowles, A Current Need to Accept Responsibility, 3 *O.S.C. Bull.* 363A, at 371A (June 25, 1982) (all other provinces encouraging foreign participation); Dey, Extracts from Speech to Ontario District Council of the Investment Dealers Association of Canada, 5 *O.S.C. Bull.* 11A, at 18A–19A (January 21, 1983) (would like "more uniformity amongst the provinces").

440. See ibid.; Notice: Re Review of Non-Resident Ownership Restrictions, 4 *O.S.C. Bull.* 2A (July 9, 1982) (deferral); 4 *O.S.C. Bull.* 238A (September 17, 1982) (cancellation).

441. See Notice: Policy Review, *supra*, note 79; Notice: O.S.C. Securities Industry Policy Review, *supra*, note 79. The notices indicate that the current policy governing non-resident ownership will not be reconsidered; see *supra*, text accompanying note 79. But it is doubtful that this issue can be avoided.

442. Compare *Bouchard Final Report*, *supra*, note 430, at 129–33 with *O.S.C. Securities Industry Ownership Report*, *supra*, note 430, at 95–96 and 188–92; see generally Connelly, *supra*, note 71, at 1381–85; Williamson, *supra*, note 430, at 793–99.

443. See *Report of the Joint Industry Committee on Public Ownership in the Canadian Securities Industry* (March 1981); and see Notice: Public Ownership in the Canadian Securities Industry, 2 *O.S.C. Bull.* 9A (July 10, 1981); see also Anisman, *supra*, note 5, at 355–56 n. 155. The Quebec Commission held its own hearing to consider the bylaw of the Montreal Exchange.

444. See News Release, 2 *O.S.C. Bull.* 37A (August 21, 1981) (British Columbia, Manitoba, Ontario and Quebec). See also *L'Appel public à l'épargne par les courtiers*, 12 *Q.S.C. Bull.* (August 11, 1981) (approving Montreal Exchange bylaw).

445. See Ontario Policy No. 4.1, 3 *CCH Can. Sec. L. Rep.* para. 54-921; Quebec Securities Act, s. 159; Quebec Securities Regulation, s. 228(3); Quebec Policy No. Q-9, *supra*, note 76, s. 9. The self-regulatory approval is mandated by the decision in the preceding note. See also Montreal Exchange Bylaw 3678, 4 *CCH Can. Sec. L. Rep.* para. 85-374b; Toronto Stock Exchange Bylaw 5.16, 4 *CCH Can. Sec. L. Rep.* para. 801-737.

    Following the recommendations in its Report to the Minister regarding Institutional Ownership and Diversification, *supra*, note 76, at 598A–99A, the Ontario Securities Commission has published a draft regulation embodying its policy; see Notice: Request for Comments — Public Ownership Restrictions, 6 *O.S.C. Bull.* 865 (May 6, 1983); and see, e.g., *In re Walwyn Inc.*, 6 *O.S.C. Bull.* 413 (April 18, 1983); *In re Midland Doherty Financial Corp.*, 6 *O.S.C. Bull.* 1943 (July 8, 1983); *In re First Marathon Inc.*, 7 *O.S.C. Bull.* 1219 (March 16, 1984) (approving conditions on registration in accordance with policy to govern holding corporation).

446. See, e.g., Connelly, *supra*, note 71, at 1383.

447. See La Propriété et la diversification des firmes de courtage, 14 *Q.S.C. Bull.* 2.1.1, at 2.1.18 and 2.1.20 (June 17, 1983); see also Avis: Instruction générale no. Q-9, 14 *Q.S.C. Bull.* 1.2.19 (July 29, 1983).

448. The Ontario Securities Commission indicated its awareness of these relationships in its public ownership policy by prohibiting dealers from carrying on business as a bank or a loan, trust or insurance company without its consent and that of any relevant self-regulatory organization and by declaring a moratorium on institutional ownership of and diversification by such registrants until it resolved these matters; see Ontario Policy No. 4.1, *supra*, note 445, ss. B.3 and C. See generally Williamson, *supra*, note 430, at 785–87.

449. The Ontario hearings were attended by representatives of the Quebec Commission and by administrators from British Columbia, Alberta and Saskatchewan; see Report to the Minister regarding Institutional Ownership and Diversification, *supra*, note 76, at 580A–81A.

450. See ibid., at 597A–98A and 605A–606A; and see *supra*, note 445.

451. See La Propriété et la diversification des firmes de courtage, *supra*, note 447. See also Quebec Policy No. Q-9, *supra*, note 76, s. 10, which requires the senior executives and employees of a firm that is controlled by a corporation, including a financial institution, to be independent of the controlling corporation. The firm must also maintain separate books and records and its members must constitute at least 40 percent of its board of directors.

452. See ibid., s. 11. The other businesses must be carried on through corporations.

453. See, e.g., Notice: O.S.C. Securities Industry Policy Review, *supra*, note 79; see also Dey, Notes for Remarks to Toronto Society of Financial Analysts, 7 *O.S.C. Bull.* 2463 (June 8, 1984).

454. See *supra*, note 450.

455. See, e.g., Quebec Policy No. Q-9, *supra*, note 76, s. 12.

456. See, e.g., *Report of the Canadian Committee on Mutual Funds and Investment Contracts*, *supra*, note 161, paras. 14.26–14.36 (dual licensing) and chap. 16 (institutional overlaps). See also, e.g., Ontario Policies Nos. 4.4 and 4.5, 3 *CCH Can. Sec. L. Rep.* paras. 54-924–54-925 (dual registration of mutual fund and insurance salesmen); Quebec Securities Act, s. 154(3) (exemption for sales by banks). The recent amendments to the Bank Act prohibit bank managed mutual funds; see Banks and Banking Law Revision Act, 1980, S.C. 1980–81, c. 40, s. 191 [hereinafter Banks and Banking Law Revision Act, 1980 without cross reference].

457. On the activities of banks and trust corporations in the securities market see generally Williamson, *supra*, note 430, at 862–912. The Banks and Banking Law Revision Act, 1980 authorizes a bank to participate in an underwriting of corporate securities for sale to public investors or through private placements only as a member of the selling group; see ss. 190(5)–(7). It is arguable that the definition of "underwriter" in the provincial securities acts excludes such activity and that a bank does not have to obtain provincial registration to engage in it; see, e.g., Ontario Securities Act, s. 1(1)43(i). But the matter is not clear; see, e.g., Williamson, *supra*, note 430, at 882–83; 2 *Canada Securities Market Proposals*, *supra*, note 40, at 43. And the commissions would not accept it; see, e.g., *O.S.C. Discount Brokerage Report*, *supra*, note 78, paras. 4.21–4.22; *In re Vencap Equities Ltd.*, *A.S.C. Summary* (September 23, 1983), 4 (denying application for exemption from registration to allow banks and Alberta Treasury Branches to participate in selling group); *cf. Bank of Montreal*, 14 *Q.S.C.* 3.2.2.(September 6, 1983) (bank charged with aiding illegal distribution). The banking legislation also empowers a bank to act as an agent for a purchaser in a distribution, if it does not solicit and effects the transaction through a registrant (see s. 190(4)) and such conduct is exempt from registration under the securities acts; see, e.g., Ontario Securities Act, s. 34(1)11; Ontario Securities Regulation, s. 141; see also *In re Canada Development Corp.*, [1974] *O.S.C. Bull.* 71 (April). Nevertheless, in recent years at least one distribution has been made through the banks in an attempt to obtain wide shareholdings; see *In re Vencap Equities Ltd.*, *supra*, at 9 (Alberta Energy Corp.). And the Alberta Commission has permitted a distribution of securities through the offices of credit unions in the province but views its decision as exceptional; see *In re Cooperative Energy Development Corp.*, *A.S.C. Summary* (September 16, 1983), 3; *In re Vencap Equities Ltd.*, *supra*. The Ontario Securities Commission, however, on the basis of its acceptance of underwriting as the core function of securities firms, has recommended the adoption of a regulation restricting the participation of all other financial institutions as underwriters; see Notice: Discount Brokerage Services, 7 *O.S.C. Bull.* 455, at 461 (January 27, 1984) (Sched. C.).

458. See Notice: Discount Brokerage and the Role of Financial Institutions, 6 *O.S.C. Bull.* 861 (May 6, 1983).

459. See *O.S.C. Discount Brokerage Report*, *supra*, note 78, paras. 1.19–1.20.

460. See ibid. The Commission concluded that full brokerage services involving investment advice as well as execution would be detrimental to the performance by the securities industry of its underwriting function; see para. 4.07.

461. Ibid., para. 7.09.

462. Notice: Canadian Securities Administrators' Press Release, 6 *O.S.C. Bull.* 3929 (November 18, 1983).

463. See Notice: Discount Brokerage Services, 7 *O.S.C. Bull.* 455 (January 27, 1984). The release also included an order and proposed regulation to confine the underwriting activities of financial institutions; see *supra*, note 457. The latter issue will be considered in the forthcoming hearing on exempt trading by non-registrants; see Notice: O.S.C. Securities Industry Policy Review, *supra*, note 79. See also Notice: Guidelines for Registration — Order Execution Access Dealers, 7 *O.S.C. Bull.* 1313 (March 23, 1984).

464. See *In re Toronto-Dominion Bank*, 7 *O.S.C. Bull.* 670 (February 10, 1984) (exemption from capital requirement).

465. See, e.g., Avis: Exercise de l'activité de courtier par les institutions financières, 14 *Q.S.C. Bull.* 1.2.1 (May 27, 1983).

466. See *supra*, note 455 and accompanying text; see also Quebec Policy No. Q-9, *supra*, note 76, s. 55. Compare *O.S.C. Discount Brokerage Report*, *supra*, note 78, para. 6.10; Notice: Discount Brokerage Services, *supra*, note 463, Sched. B, s. B.3.

467. See Avis, *supra*, note 465; Avis: Rôle des institutions financières dans le régime d'épargne-actions, 14 *Q.S.C. Bull.* 1.2.1 (November 25, 1983). The Ontario Securities Commission's Report took a less restrictive view of the meaning of solicitation, but ultimately decided not to determine the question; see *O.S.C. Discount Brokerage Report*, *supra*, note 78, paras. 4.07, 4.15, 4.25–4.26 and 6.04–6.05; and see *In re Discount Brokerage and the Role of Financial Institutions*, 7 *O.S.C. Bull.* 458,

Schedule A to Notice: Discount Brokerage Services, *supra*, note 463 (order denying trading exemption under Ontario Securities Act, s. 34(1)11).

468. See *O.S.C. Discount Brokerage Report*, *supra*, note 78, para. 7.02; Notice: O.S.C. Securities Industry Policy Review, *supra*, note 79. See also Dey, *supra*, note 453 ("our approach . . . one . . . to resolving the pressures for a more integrated financial system").

469. See Report of the Alberta Securities Commission concerning Abacus Cities Ltd., *A.S.C. Summary* (July 20, 1984), 2, at 9 (better regulatory scrutiny if one agency in province).

470. A committee has been appointed in Ontario under the chairmanship of Professor Stefan Dupré to study and report on these questions and a similar committee chaired by Roy MacLaren has been appointed by the federal Minister of Finance.

471. See, e.g., Quebec Bill 75, June 1983.

472. *Cf.* Knowles, Integration of Financial Services: Notes for an Address at the 9th Annual Conference of the International Association of Securities Commissions, July 30, 1984, recommending the creation of a federal agency with regulatory jurisdiction over all financial institutions operating interprovincially. Mr. Knowles is the immediate past chairman of the Ontario Securities Commission. And *cf. Report of the Canadian Committee on Mutual Funds and Investment Contracts*, *supra*, note 161, paras. 19.03–19.07 and 19.15–19.17.

473. See *supra*, text accompanying notes 80 to 85.

474. See, e.g., Toronto Stock Exchange, Bylaws, Parts III–VIII and XVI (members); Policies, Parts I–II, VII–VIII (listed corporations).

475. See, e.g., ibid., Bylaws, Parts X–XI.

476. See, e.g., Cleland, *supra*, note 155, at 994 (Candat) (developed "principally to service smaller and more remote communities").

477. See, e.g., Toronto Stock Exchange, Distributions through the Facilities of the Toronto Stock Exchange, Circular No. 5 (March 1983), 4 *CCH Can. Sec. L. Rep.* paras. 815-431ff.

478. See, e.g., Toronto Stock Exchange Bylaws, Parts XXII and XXIV–XXVII. See also, e.g., *In re Montreal Exchange*, 3 *O.S.C. Bull.* 138B (February 19, 1982); 4 *O.S.C. Bull.* 72B (August 13, 1982) (gold options); *In re the Toronto Stock Exchange*, 4 *O.S.C. Bull.* 346C (October 22, 1982) (Toronto equity futures contract).

479. See, e.g., Toronto Stock Exchange Bylaws, Part XXIII; see also Policies, Part XVII (June 1977) (memorandum on implementation of new rules). And see *infra*, note 493.

480. See, e.g., *Moore Report*, *supra*, note 424.

481. Compare Toronto Stock Exchange Circular No. 5, *supra*, note 477, with Vancouver Stock Exchange, Rule B.5.00, 4 *CCH Can. Sec. L. Rep.* para. 905-801. But see Dey, *supra*, note 48, at 1574 (Toronto market not "in direct competition with the Vancouver market in the risk capital formation process"). For an argument suggesting that competition between the Canadian exchanges with respect to listing of securities and trading in them is counterproductive because it undermines the development of an efficient trading market, see Baillie, "Securities Regulation in the Seventies", in Ziegel (ed.), *Studies in Canadian Company Law* (Butterworth, 1973), vol. 2, 343, at 378–79.

482. See, e.g., *In re The Montreal Options Clearing Corp.*, [1976] *O.S.C. Bull.* 93 (March); Dey and Makuch, *supra*, note 80, at 1481; and see, e.g., *Netpro Report*, *supra*, note 217. Options trading is discussed *infra*, text at note 507 and following.

483. See, e.g., *Toronto Stock Exchange*, *A.S.C. Summary* (July 15, 1983), 8 (T.S.E. 300 Composite Index Options); *B.C. Corp., Fin. & Reg. Services Weekly Summary* (July 8, 1983), 15.

484. See, e.g., Toronto Stock Exchange Act, 1982, S.O. 1982, c. 27; Alberta Stock Exchange Act, S.A. 1974–75, c. 79.

485. See, e.g., Anisman and Hogg, *supra*, note 4, at 139–41; Dey and Makuch, *supra*, note 80, at 1478–81. And see Dey, Outline of Comments: The Fédération Internationale des Bourses de Valeurs, 6 *O.S.C. Bull.* 3229, at 3230 (October 7, 1983) (self-regulatory

organizations "do not function neatly within provincial boundaries, but span many jurisdictions").

486. See, e.g., *In re Bralorne Resources Ltd.*, [1976] *O.S.C. Bull.* 258 (September). This decision is discussed *infra*, text following note 492.

487. Prior to 1966 the administrators in four provinces could withdraw an exchange's recognition and, in effect, deny it the right to carry on any business, a power that realistically could not be invoked; see, e.g., Williamson, *supra*, note 6, at 265. For a general historical overview see Dey and Makuch, *supra*, note 80, at 1415–33; see also Baillie, *supra*, note 481, at 376–80. Three of the Maritime provinces generally exempted the sale of securities listed on a designated exchange from their statutory equivalent of prospectus disclosure; see, e.g., Williamson, *supra*, note 6, at 135 and 420; note 11, at 502; and see now, e.g., Prince Edward Island Securities Regulation, s. 4(c), 3 *CCH Can. Sec. L. Rep.* para. 55-989. The reform of Ontario's securities laws in 1966 gave the Commission general supervisory authority over the Toronto Stock Exchange; see, e.g., Dey and Makuch, *supra*, at 1427–30; see now Ontario Securities Act, s. 22. Similar jurisdiction has been granted to the administrators in Alberta, British Columbia and Manitoba; see Alberta Securities Act, s. 52; British Columbia Securities Act, s. 139; Manitoba Securities Act, s. 139. The Quebec Securities Act contains a more fully articulated supervisory scheme which also enables the Commission to require the Montreal Exchange to alter its rules; see Quebec Securities Act, ss. 169–186. *Cf.* 1 *Canada Securities Market Proposals*, *supra*, note 40, Part 9; 2 ibid.

488. See Williamson, *supra*, note 6, at 265–66.

489. See *In re Mills, Spence & Co. Ltd.*, 1 *Q.S.C. Weekly Summary*, No. 4, at 2 and 4 (1970). The policy was the Commission's Policy No. 4.

490. Anisman and Hogg, *supra*, note 4, at 142.

491. See Notice: Abrogation of Policy Statement Number 4, 8 *Q.S.C. Bull.* (September 6, 1977); and see Anisman and Hogg, *supra*, note 4, at 142. See also Dey and Makuch, *supra*, note 80, at 1481–82.

492. See Ontario Securities Regulation, s. 140(b); Ontario Policy No. 3.1, *supra*, note 328, s. I. And see Decision 84-E-1116, *supra*, note 414.

493. See, e.g., Anisman, *supra*, note 14, at 51–55. The initial policy of the Toronto Stock Exchange was to prohibit the use of its "special bid" procedure if the purchases would otherwise have come within the statutory definition of "takeover bid"; ibid., at 54. The exchanges, however, began to allow use of the statutory exemption during a low trading period in the early 1970s and after the successful and controversial bid for The Price Company Ltd. by Abitibi the Montreal and Toronto Exchanges devised a regulatory procedure to govern such stock exchange takeover bids; see, e.g., Toronto Stock Exchange Policies, Part XVII, *supra*, note 479.

494. The proposed framework was also presented to the federal Department of Consumer and Corporate Affairs by the Montreal and Toronto Exchanges. The bill that became the Canada Business Corporations Act was then before the House of Commons and an amendment to it was adopted to enable the Department to adopt any solution accepted by the provincial commissions; see Canada Business Corporations Act, s. 187 "exempt offer" (b); see also Standing Senate Committee on Banking, Trade and Commerce, *Proceedings*, Issue No. 24, February 13, 1975, at 15–17 (testimony of J.L. Howard and P. Anisman).

495. See *In re Bralorne Resources Ltd.*, [1976] *O.S.C. Bull.* 258 (September). The federal government followed suit; see Canada Business Corporations Regulation, s. 58; see also 2 *Canada Securities Market Proposals*, *supra*, note 40, at 123.

496. See *supra*, note 328 and text accompanying notes 312 and 479 and following.

497. See *supra*, text accompanying notes 333 to 405.

498. See, e.g., Notice, 3 *O.S.C. Bull.* 373A (June 25, 1982); *In re Toronto Stock Exchange General By-law, Part XV and Sections 22.93 to 22.99*, 3 *O.S.C. Bull.* 431B (June 25, 1982) (order); *In re Toronto Stock Exchange By-laws, Part XV*, 3 *O.S.C. Bull.* 136C (June 25, 1982) (reasons). The effective date of the order was April 1, 1983.

499. See Dey and Makuch, *supra*, note 80, at 1478–79 (T.S.E. "in a position to dictate commission rates").

500. See, e.g., ibid.; Anisman and Hogg, *supra*, note 4, at 139. The Quebec Securities Commission had received a report of a task force opposing fixed rates prior to the 1976 decision of the Ontario Commission approving them; see Q.S.C. Task Force, *Commission Rates in the Securities Industry* (June 1976); see also *Updated Report on Commission Rates in the Securities Industry* (December 1976). For a discussion of the treatment of these issues and of the Quebec reports see Williamson, *supra*, note 430, at 830–39.

501. See Dey and Makuch, *supra*, note 80, at 1480.

502. See *In re Toronto Stock Exchange By-laws, Part XV*, *supra*, note 498, at 136C; see also Anisman, *supra*, note 5, at 354–55. The Manitoba Commission was invited but did not participate in the hearing because of "budget constraints" and the "relative inactivity" of the Winnipeg Stock Exchange; Ontario Legislature Standing Committee on Administration of Justice, *Estimates, Ministry of Consumer Relations*, No. J-12 (October 30, 1981), at 236 (testimony of H.J. Knowles).

503. See, e.g., Anisman, *supra*, note 5, at 354 n. 151.

504. Ont. Leg. Standing Comm. on Administration of Justice, *supra*, note 502, at 236 (H.J. Knowles), quoted ibid., at 355.

505. See *In re Toronto Stock Exchange By-laws, Part XV*, *supra*, note 498; Notice, *supra*, note 498. The two commissions agreed on the April 1 date; ibid.

506. See *In re the By-Laws of the Alberta Stock Exchange*, *A.S.C. Summary* (July 16, 1982), 3; Notice: Amendment of Stock Exchange Bylaw on Commission Rates, *A.S.C. Summary* (May 27, 1983), 3 (approving amendment to Alberta Stock Exchange bylaws).

507. See, e.g., *Recognized Options: Clearing Organizations*, 7 *O.S.C. Bull.* 2684 (June 22, 1984).

508. See *In re The Montreal Options Clearing Corp.*, [1976] *O.S.C. Bull.* 93 (March); see also Dey and Makuch, *supra*, note 80, at 1481. The Commission's decision resulted in the creation of Trans-Canada Options, Inc.; see Williamson, *supra*, note 172, at 77–78. *Cf.* Baillie, *supra*, note 481.

509. See, e.g., *Netpro Report*, *supra*, note 217, para. 2.01.

510. Ibid., para. 1.04.

511. Ibid., paras. 2.02 and 5.08.

512. See Decision No. 7153, 15 *Q.S.C. Bull.* 2.1.2 (July 20, 1984); *Recognized Options: Clearing Organizations*, *supra*, note 507.

513. See *In re Consolidated Ascot Petroleum Corp.*, 6 *O.S.C. Bull.* 3169 (September 30, 1983). See also *supra*, notes 269 to 271 and accompanying text.

514. See *In re Duncan Gold Resources Inc.*, 7 *O.S.C. Bull.* 1633 (April 13, 1984) (payment of shares conditional on approval of Vancouver Exchange).

515. See *In re Agassiz Resources Ltd.*, 6 *O.S.C. Bull.* 2147 (July 22, 1983) (Alberta Exchange's rules same as T.S.E.'s). The Ontario Commission has since adopted a policy on this matter; see *infra*, note 519. See also *Agassiz Resources Ltd.*, 14 *Q.S.C. Bull.* 2.1.1 (July 29, 1983) (equivalent to M.E. rules); but see *infra*, note 519.

516. See *supra*, note 230 and accompanying text; see also, e.g., *Queenstake Resources Ltd.*, *A.S.C. Summary* (November 11, 1983), 11; *In re Regional Resources Ltd.*, *A.S.C. Summary* (May 18, 1984), 19. The Manitoba Commission has approved the Toronto Stock Exchange policy and will consider applications for exemption "on a case by case basis"; Manitoba Policy No. 3-13, *supra*, note 230.

517. See *In re Montreal Exchange*, 4 *O.S.C. Bull.* 72B (August 13, 1982) (gold options); *In re Montreal Exchange*, 4 *O.S.C. Bull.* 317B (December 3, 1982) (commodity options).

518. See *supra*, note 493.

519. See Alberta Policy No. 3-13, *supra*, note 82, Apps. A and B (prior written approval); Decision No. 6926, 14 *Q.S.C. Bull.* 2.1.1 (September 16, 1983); Decision No. 6927, 14 *Q.S.C. Bull.* 2.1.3 (September 16, 1983). The latter decision of the Quebec Commis-

sion requires its prior approval for rule changes but the former requires that the rules of the extraprovincial exchanges be equivalent in substance to the Montreal Exchange's. The Quebec Commission's approval of stock exchange takeover bid rules outside Quebec is not similarly conditioned; see Decision No. 6812, 14 *Q.S.C. Bull.* 2.1.16 (April 8, 1983). Interestingly, especially in view of its *Agassiz Resources* decision, *supra*, note 515, the Quebec Securities Commission has not granted reciprocity to Alberta; the Alberta Commission has recognized the Montreal Exchange, but Quebec has not granted recognition to the Alberta Exchange's takeover bid regime, as the Ontario Commission has. *Cf.* Ontario Policy No. 3.1, *supra*, note 328, s. E, basing recognition on confirmation that the bylaws in question comply with specified conditions.

520. The power derives from the Commission's authority to require the Montreal Exchange to amend its rules; see Quebec Securities Act, s. 180; see also Decision No. 6926, *supra*, note 519.

521. See Ontario Policy No. 3.1, *supra*, note 328.

522. See, e.g., *In re Bralorne Resources Ltd.*, *supra*, note 495.

523. See, e.g., Dey and Makuch, *supra*, note 80, at 1478–81 (no body currently to address national interests). It is doubtful that a single regulatory authority would affect the potential for inter-exchange competition in any manner that is not now possible; see *supra*, note 508 and accompanying text.

524. See, e.g., Knowles, Self-Regulatory Organizations in the Canadian Securities Industry, 3 *O.S.C. Bull.* 291A, at 293A (May 7, 1982); Dey, *supra*, note 332, at 3482 (provinces resist lobbying for federal securities commission "by developing a comprehensive provincial scheme of compatible legislation"). *Cf.* Toronto Stock Exchange, Notice to Members No. 3550, April 2, 1982, para. 4 (raising increased "likelihood of federal regulatory intervention" as argument against "user fee system" proposed by Ontario Securities Commission).

525. See, e.g., *supra*, text accompanying notes 16 to 27 and notes 136 to 141.

526. An attempt to reduce such delays was made in connection with the Ontario Securities Act, 1978 but it was not successful; see *supra*, text at note 19 and following.

527. See *supra*, notes 20 and 21 and accompanying text.

528. See, e.g., *supra*, note 23 and accompanying text.

529. See *supra*, text accompanying notes 116 to 155.

530. See *supra*, text accompanying notes 156 to 213.

531. See *supra*, text accompanying notes 199 to 213.

532. See, e.g., *supra*, text accompanying notes 295 to 364.

533. See, e.g., *supra*, text accompanying notes 365 to 405.

534. See *supra*, text accompanying notes 285 to 294.

535. See *supra*, text accompanying notes 396 to 405.

536. See, e.g., *supra*, text accompanying notes 322 to 325.

537. See *supra*, text accompanying notes 473 to 523.

538. See *supra*, text accompanying notes 468 to 472.

539. Ontario Securities Commission, *Cansec: Legal and Administrative Concepts*, [1967] *O.S.C. Bull.* 61, at 69 (November).

540. While the provincial legislatures might accomplish similar results through uniform legislative recognition of the decisions of extraprovincial administrators, it is inconceivable that such a solution would be adopted.

541. See, e.g., Pattison, *Financial Markets and Foreign Ownership* (Ontario Economic Council, 1978), at 127; Pattison, "Dividing the Power to Regulate", in Walker (ed.), *Canadian Confederation at the Crossroads* (Fraser Institute, 1978), 109, at 135–36; Hadden *et al.*, *supra*, note 157.

542. See, e.g., 1 *Canada Securities Market Proposals*, *supra*, note 40, s. 1.02; 2 ibid., at 2–5.

543. See, e.g., ibid.; see also Anisman and Hogg, *supra*, note 4, at 138–43; Anisman, *supra*, note 5, at 352–62.

544. See, e.g., ibid., at 352–57.

545. See, e.g., ibid., at 359–62; and see *supra*, notes 10 and 158 and accompanying text.

546. See, e.g., *supra*, text accompanying notes 488 to 491; see also, e.g., Dey and Makuch, *supra*, note 80, at 1478–81; "Preface" in Walker (ed.), *supra*, note 541, at xv ("provincial pursuit of provincial interests has not been tempered out of concern for national integrity"); Walker, "Introduction: Canadian Confederation at the Crossroads", ibid., 3, at 24 ("economic activity by the various provinces . . . reflects the narrow pursuit of parochial interests").

547. See, e.g., Anisman, *supra*, note 5, at 345 n. 104, citing reported statements of chairmen of Alberta, Ontario and Quebec Securities Commissions.

548. See, e.g., 2 *Canada Securities Market Proposals*, *supra*, note 40, at 4, citing the example of I.O.S. Ltd.; see also generally Raw, Page, and Hodgson, "*Do You Sincerely Want to be Rich?*" (Bantam, 1972). *Cf. Belgium Standard Ltée*, 15 *Q.S.C. Bull.* 2.1.7 (January 27, 1984).

549. See, e.g., *S.E.C. v. Unknown Purchasers*, [1983–1984 Transfer Binder] *CCH Fed. Sec. L. Rep.* para. 99,424 (S.D.N.Y. 1983); *cf.* Interpretation Note 2, 6 *O.S.C. Bull.* 4536 (December 22, 1983). See also S.E.C., Securities Exchange Act Release No. 21186, July 30, 1984 (proposing concept of "waiver by conduct" to combat insider trading and fraudulent conduct through secret foreign bank accounts). And see *supra*, note 268 and accompanying text.

550. See, e.g., Request for Comments: Proposed Section 73 Ruling — Eurosecurity Distributions, 7 *O.S.C. Bull.* 2259 (May 25, 1984).

551. See, e.g., *In re Montreal Exchange*, 4 *O.S.C. Bull.* 72B (August 13, 1982) (consecutive trading sessions on Amsterdam, Montreal and Vancouver Exchanges); *In re Montreal Exchange*, 4 *O.S.C. Bull.* 317B (December 3, 1982) (European Options Exchange).

552. See Slocum, "Benefit seen in linking exchanges", *The Globe and Mail* (September 5, 1984), p. B3, col. 2 (Montreal Exchange with Boston Stock Exchange for actively traded U.S. stocks); Slocum, "T.S.E. plans electronic link with U.S. exchanges", *The Globe and Mail* (September 7, 1984), p. B1, col. 1 (Toronto Stock Exchange seeking similar arrangement).

553. See, e.g., Howard, *supra*, note 32, at 1698–1700.

554. See, e.g., 1 *Canada Securities Market Proposals*, *supra*, note 40, ss. 5.10 and 6.05; 2 ibid., at 85–106 ("policy of enabling a province to establish the level of protection for its own investors where only they are directly affected", at 104). The ability of a province to adopt its own policies with respect to distributions to obtain risk capital, usually for natural resource corporations, has been one of the primary reasons for suggesting the superiority of provincial regulation over federal; see, e.g., Dey, *supra*, note 48, at 1574–75; *cf.* Getz, "Book Review" (1982), 16 *U.B.C. L. Rev.* 379, at 382 (provincial regulation "tends to be more accessible, more sensitive to local circumstances and, for these reasons, politically more palatable"). Needless to say, it is possible to have both; see, e.g., Anisman, *supra*, note 5, at 364–65, summarizing *Canada Securities Market Proposals*.

555. See, e.g., Ontario Securities Commission, *supra*, note 539; Howard, *supra*, note 32, at 1690–97.

556. See Howard, *supra*, note 32, at 1701–13.

557. But see ibid., at 1710 (not a great risk).

558. While Howard would prefer uniform laws, the "integrated model" recommended by him does not require them; see ibid., at 1705–10. Without uniformity it would be necessary to determine whether conduct giving rise to any enforcement activity is intraprovincial or interprovincial in order to know which statutory provisions are applicable; see, e.g., *Dominion Stores Ltd. v. R.*, [1980] 1 S.C.R. 844 (1979).

559. But see Howard, *supra*, note 32, at 1696. The Australian National Companies and Securities Commission is established under federal legislation pursuant to an agreement between the federal government and the states. The agreement is included as a schedule to the National Companies and Securities Commission Act 1979, Aust. Act No. 173 (1979). The agreement provides for uniform federal and state legislation the

administration of most of which is given to the state commissions as delegates of the National Commission. Amendments to the scheme must be approved by a ministerial council which is composed of the ministers from the states and the federal government responsible for corporate and securities legislation. The ministerial council also has direct administrative authority under some provisions of the scheme and has supervisory jurisdiction over the National Commission. The Council has its own secretariat. On the Australian scheme see generally Baxt, Ford, Samuel, and Maxwell, *An Introduction to the Securities Industry Codes* (2d ed. Butterworth, 1982), at 22–49. See also, e.g., National Companies and Securities Commission, *Fourth Annual Report and Financial Statements: 1 July 1982 to 30 June 1983* (Australian Govt. Publishing Service, 1983). The *Report*, at 8, suggests some difficulties in the administration of the scheme as a result of a lack of adequate control over its delegates by the N.C.S.C.

560. See 1 *Canada Securities Market Proposals*, *supra*, note 40, Part 15; 2 ibid., at 329–79; and see Anisman, *supra*, note 5, at 364. The constitutional basis of the Proposals is specified in 1 *Canada Securities Market Proposals*, s. 16.01; see also 2 ibid., at 382–84.

561. See, e.g., 1 *Canada Securities Market Proposals*, *supra*, note 40, ss. 15.06–15.09 and 16.01; Howard, *supra*, note 32, at 1687–89; Anisman and Hogg, *supra*, note 4, at 214–17.

562. See, e.g., *Reference re Agricultural Products Marketing Act*, [1978] 2 S.C.R. 1198; *cf. Dominion Stores Ltd. v. R.*, *supra*, note 558.

563. See *Multiple Access Ltd. v. McCutcheon* (1982), 18 Bus. L.R. 138, at 153 (S.C.C.) (dictum suggesting federal jurisdiction to enact "general scheme of securities legislation" under power to legislate "in relation to interprovincial and export trade and commerce" *per* Dickson, J.).

564. See, e.g., 2 *Canada Securities Market Proposals*, *supra*, note 40, at 332.

565. See 1 *Canada Securities Market Proposals*, *supra*, note 40, Part 9.

566. See *supra*, note 554 and accompanying text.

3

Harmonization of Canadian Personal Property Security Law

RONALD C.C. CUMING

Introduction

The terms of reference of the Royal Commission on the Economic Union and Development Prospects for Canada include the mandate to examine and report on, *inter alia*, "the constraints in the national economic framework" and "the appropriate institutions and constitutional arrangements for the maintenance of a strong and competitive economy." Of course, many factors influence, either positively or negatively, the development of a national economy. One is the legal structure within which economic activity must function. The national economy is a composite of all the economic activity being carried on in the various subdivisions of the country. Thus, while the legal structures of each subdivision or jurisdiction may well be conducive to the maintenance of maximum efficiency of economic activity within that jurisdiction, an important part of the national economy is forced to function below its potential if the legal structures of the jurisdictions are not also conducive to the maintenance of efficient economic activity with respect to those types of business transaction which extend beyond the borders of a jurisdiction.

The purpose of this paper is to examine in some detail the question as to whether or not harmonization of the personal property security law of Canadian jurisdictions is a justifiable and realizable goal. We begin by constructing a functional definition of the term "harmonization." Then we examine the major areas of disparity with regard to personal property security law. Finally we assess efforts in Canada and the United States to achieve harmonization of personal property security law.

It is perhaps easy to overstate the practical importance of inter-

jurisdictional harmonization of laws affecting business activity. Some types of business require little legal regulation, and for their transactions the law has only peripheral significance. For them, lack of interjurisdictional harmonization of the applicable laws can be an irritant, but adds little to the cost or uncertainty of business activity extending beyond the boundaries of a particular jurisdiction. This is the case in situations where bilateral relations regulated by contract are involved. Other types of business activities, however, are more heavily influenced by the legal framework within which they are carried on. It is in the context of these that the strongest case for interjurisdictional harmonization can be made.

Personal property security transactions fall into this latter category primarily because a secured financing transaction is likely to affect the rights of persons other than the parties to the financing agreement. A security interest in personal property has the effect of giving to the secured party, the financer, the right to seize those items of property belonging to his defaulting debtor which have been taken as collateral under the security agreement. The exercise of this right may well result in a conflict between the secured party and other persons claiming rights in the same property. This group of claimants may include another secured financer who has loaned money to the debtor, unsecured creditors of the debtor, or someone who has purchased the collateral from the debtor.

In order to avoid conflict or to provide for a system under which the priorities of various conflicting claims can be regulated, all jurisdictions in Canada have elaborate personal property security laws, most of which provide for public registration of interests of secured financers. Thus, in the context of secured commercial lending, the applicable law has more than peripheral significance. As a practical matter, its requirements must be observed in all financing transactions if secured creditors expect to have the legal status they seek by employing security agreements. To the extent that these requirements are difficult to meet, the cost of financing is correspondingly increased.

A financer carrying on business in several jurisdictions in Canada is required to comply with the applicable personal property security law of each jurisdiction. Lack of substantial harmony among the laws of the jurisdictions in which he carries on business will inevitably increase his costs. At best, he will be required to obtain legal advice concerning the laws of each jurisdiction, prepare separate contractual forms, and establish separate procedures for use in each of those jurisdictions. The need to do this may be of no great significance with respect to jurisdictions that offer a large potential market for the financer. However, the extra costs involved in compliance with the law of a jurisdiction that offers only a small market may at worst discourage entry into that market. The result may well be the loss of a potential new source of competition in

that jurisdiction. At best, it will result in a higher cost to the users of credit in that market.

There are situations in which a financer cannot avoid having to comply with the law of jurisdictions other than the ones of his choice. His debtor may move the collateral into another jurisdiction and keep it there. Alternatively, the security interest may be of such scope as to encompass property of the debtor located in two or more jurisdictions. The collateral may be of a type which has no *situs* itself, and the applicable law dealing with security interest in it may be difficult to identify.

The fact that it can be demonstrated to be more convenient and more cost-efficient to have harmonized personal property security law throughout Canada does not end the inquiry, however. Other considerations cannot be ignored. It may well be that there are good reasons for having major differences in the personal property security laws of various jurisdictions. There is little doubt that such disparity now exists. At least some of it may have resulted from the implementation of a variety of policies that are more important to residents of the jurisdictions than the increased level of efficiency that results from harmonization.

Even if such policies do not exist or, if they do exist, are of minor significance, it does not follow that an irrefutable case for harmonization has been made out. It remains necessary to weigh against the marginal gains in cost efficiency that result from legislative harmony the resources that must be devoted to obtaining and maintaining it. The efficiency that can be realized does not result from a reduction of legal intervention in business activity. Modern personal property security legislation recently enacted in a few Canadian jurisdictions is innovative and complex. If it is used as the basis for interjurisdictional harmonization, the amount of effort that must be invested in securing its adoption in all jurisdictions and in discouraging local variations will be significant.

Concerted efforts to attain uniformity of personal property security law have been undertaken on several occasions during the course of recent Canadian history, but with only modest success. While it would be a mistake to assume that the level of success achieved in the past can be bettered, it would be as much a mistake to assume that nothing can be learned from past experiences. Thus a significant portion of this paper examines the history of legislative regulation of personal property security transactions and the efforts of organizations such as the Uniform Law Conference of Canada and the Canadian Bar Association to attain legislative harmony in this area of the law.

While these efforts in Canada have yielded very modest success, the same cannot be said of similar efforts in the United States. Article 9 of the Uniform Commercial Code has provided the model for the personal property security law of 50 jurisdictions. While the political, social, and economic realities of Canada do not permit simple duplication of American measures in this country, American experience cannot be ignored.

Accordingly, a segment of this paper explores the approaches used in the United States to realize the goal that has so far eluded Canadians.

A Definition of "Harmonization"

Any attempt to assess the current level and prospects for securing an increased level of harmonization of personal property security law must begin with a functional definition of the term "harmonization." By itself the term is not helpful since it can be used to describe a wide range of very different situations. In the first place, it is necessary to decide whether it contemplates harmonization among the laws of all Canadian jurisdictions, harmonization among the laws of jurisdictions within specific regions of Canada, or harmonization of the laws of those jurisdictions with legal systems based on the common law of England. Since the definition to be selected is to be functional rather than theoretical, it follows that it should be arrived at after assessing the existing and potential needs of persons affected by the law and by assessing the current and prospective political climate for reform in this area of the law.

Factors to be Included

There is at least one reason why the term should be defined as including harmonization of the personal property security laws of all jurisdictions. Unless social and economic needs existing in particular regions or provinces dictate divergence, harmonization should be a goal for Canadian legislatures primarily because it facilitates the free flow of capital throughout the entire country. While Canada can be broken down into geographic regions, the flow of capital and the movement of goods are rarely dictated by geography. A province on the borders of one geographic region may be contiguous to a province on the border of another geographic region. There is no reason to believe that the factors that induce harmonization between provinces within a region should not induce harmonization between contiguous provinces of two regions.

The contention that a definition of harmonization in the context of personal property security law should be confined to the laws of jurisdictions with legal systems based on the common law must also be addressed. If economic factors alone are considered, the contention is without substance. The Quebec economy represents a significant portion of the Canadian economy. Creditor grantors in Quebec and in neighbouring provinces are in no better position than creditor grantors in other provinces to ensure that their rights as secured creditors will not come into conflict with rights arising under the laws of another jurisdiction.[1]

However, if harmonization is to be viewed as a functional concept, it must accommodate the fact that basic differences exist between the personal property security law of Quebec and the common law provin-

ces. Under contemporary circumstances, these differences leave little room for accommodation. If, however, the National Assembly of Quebec were to implement the recommendations of the Civil Code Revision Office[2] in the near future, harmonization of the personal property security law of Quebec with that of other Canadian jurisdictions would be possible. The fact that the Civil Code Revision Office was prepared to recommend fundamental changes which, if adopted, would remove the conceptual barriers between the personal property security law of Quebec and that of other provinces provides strong support for the contention that nationwide harmonization of this area of the law is a realistic goal.

The next step in arriving at a functional definition of harmonization involves identification of the types of personal property security transactions with respect to which harmonization is important and politically attainable. Secured financing in Canada can be divided roughly into two categories: business financing and consumer financing. This categorization is useful in isolating those aspects of personal property security law which should be the focus of harmonization efforts.

The use of security interests to secure consumer debt is widespread in Canada. Elaborate legislative measures have been adopted in most jurisdictions to protect consumers from what are perceived to be the unduly harsh consequences that otherwise would result from the application of general personal property security law to consumer credit transactions. Generally, there is little uniformity of approach to the protection of credit consumers.[3] This lack of uniformity is a product of several factors, including basic differences of opinion as to the level and type of protection needed, the political orientation of current or past governments of particular jurisdictions, and historical events, such as the Great Depression of the 1930s, which led to special measures to protect debtors and which conditioned the general outlook of the population of a jurisdiction or region toward debtor-creditor relationships.[4]

Clearly, many of the differences between the personal property security laws of Canadian jurisdictions are not accidental nor can they be attributed to the lack of effective mechanisms designed to address harmonization of provincial consumer credit law. They generally reflect important differences in approach to the problems arising in the context of consumer debt. One of the primary objectives of a federal structure is to permit each unit of the federation the freedom to deal with matters of local significance in its own way, free from the dictates of a national legislature that generally imposes uniform solutions.[5] Many measures designed to protect credit consumers fall within the category of matters of local significance. Although credit grantors who carry on business throughout Canada would benefit from a uniform set of legal rules dealing with relationships between credit grantor and credit consumer, it is not at all clear that the marginal gain in cost efficiency could ever be

sufficient to justify attempts to homogenize credit consumer protection measures so that they no longer reflect the different values and economic conditions that exist from time to time in different regions and jurisdictions of Canada.

For this reason the primary focus of this paper is the harmonization of that portion of personal property security law which affects secured business financing. This does not mean, however, that there is no scope for interjurisdictional harmonization of those aspects of personal property security law which incidentally extend to secured consumer credit transactions but which do not embody significant social and political choices. Security interests taken in consumer assets are subject to most of the same rules dealing with perfection and priorities as are applicable to security interests in commercial assets. Few special rules are required to protect consumer interests.

In the context of business financing arrangements, those aspects of personal property security law directly affecting the creditor-debtor relationships may also reflect local policies and attitudes. This results from the perception that many business borrowers are in a weak bargaining position when seeking business financing and, in this respect, are not fundamentally different from consumers. While the relative *inter partes* rights of credit grantors and business credit users need not be totally excluded from consideration when dealing with interjurisdictional harmonization, it is important to recognize that there are aspects of these rights on which universal agreement is likely to be impossible.[6]

Another important aspect of harmonization which requires refinement before a functional definition of harmonization can be formulated is the degree of harmonization being considered. Harmonization can be nothing more than the adoption of a set of rules or practices designed to remove doubt as to which of two or more different systems of law is to be applied in particular cases. Viewed in this way, harmonization would be the existence of a workable set of conflict of laws rules dealing with choice of law problems in an interprovincial context and rules delineating the scope of operation of applicable law in the federal-provincial context. While even this basic level of harmonization has never been satisfactorily achieved in Canada,[7] those involved in efforts directed toward removing legal barriers to free movement of capital in Canada have always set a much higher goal. Although an adequate set of conflict of laws rules is an important feature of harmonization, it should not be treated as the only aspect of the definition.

Harmonization may also be equated with compatibility — that is, the elimination of fundamental differences in underlying concepts of the personal property security laws of all jurisdictions. Harmony in this sense would exist in Canada if the legal systems of all Canadian jurisdictions were to accept a generic concept of security interest as the basis for all personal property security transactions. The fact that each jurisdic-

tion prescribes a different priority structure for competing security interests would be of no concern. All that this level of harmonization seeks to guarantee is that persons who conduct their business activity in, or find their rights subject to the laws of more than one jurisdiction are assured that the conceptual basis of the law of each jurisdiction is the same. While it is inadequate as a goal for harmonization, even this modest level of harmonization has not been achieved in Canada. Differences in priority rules force credit grantors to assess risks under the laws of each jurisdiction. The result is that the economies resulting from standardization in credit granting practices are precluded.

At the end of the spectrum opposite to the minimal characterization of harmonization as a set of conflicts rules or mere conceptual compatibility among legal systems is complete statutory uniformity. This entails each jurisdiction enacting legislation identical or substantially identical to that of all the other jurisdictions. While this has been the goal of the Uniform Law Conference of Canada and the Canadian Bar Association Committee on a Model Uniform Personal Property Security Act,[8] only the most naive advocate of harmonization could expect that it will ever be totally realized. Even if unanimity on all relevant conceptual and policy issues is reached, differences in law will be inevitable. The fundamental differences between the common law and the civil law systems with respect to the structure of legislation and legislative drafting make it impossible to have the personal property security law of Quebec identical to that of other provinces.[9] Even in the context of the common law provinces, complete uniformity is an unrealistic goal. The dynamic nature of this area of the law dictates frequent amendments to legislation. It is impossible to orchestrate simultaneous amendments of all provincial personal property security legislation even in the unlikely event that there exists general agreement that an amendment is necessary.

Another definitional difficulty that must be addressed is the scope of the term "personal property security law." While there is a core of law that clearly carries this label, it does not encompass a discrete body of law. Security interests in moveable property come into conflict with a wide range of other types of interest, including those of prior owners, subsequent buyers, unsecured creditors, and a plethora of lien claimants (both private persons and governments), just to name the most common. One of the difficulties in dealing with these interests in the context of harmonization is that important policy choices are generally involved in the determination of the relative priority status to be given to some of them.[10] As noted elsewhere in this paper, it is not possible or desirable to have local values disregarded in order to attain a high level of inter-jurisdictional harmonization of law. Harmonization, therefore, must be confined to that core of personal property security law which does not reflect localized policy choices and values.

An adequate definition of harmonization of basic personal property

security law should also encompass a measure of harmonization of the operational rules of registries through which the existence of personal property security interests is disclosed to the public. While, again, it is unrealistic to seek uniformity of this aspect of personal property security law, functional harmonization of personal property security law cannot be confined to personal property security legislation alone. Major differences among the registry systems of Canadian jurisdictions can be as an effective an impediment to interjurisdictional secured business financing as differences in legislation. Personal property registries occupy a central, indispensable role in a modern personal property security system. Accordingly, effective harmonization of Canadian personal property security law necessarily includes harmonization of the rules and procedures basic to their functioning.

It would be a mistake to assume that it is possible to develop anything approaching a scientifically precise definition that would take into consideration all the relevant factors underlying personal property security law in Canada. However, the factors described in the preceding paragraphs are the ones which, in the opinion of the author, have been, and are likely to continue for the foreseeable future to be important. It must be stressed that the definition set out below does not describe an ideal or utopian standard. In the author's opinion, it describes a realistic standard against which current levels of harmonization may be compared and a standard attainable under the economic and political circumstances which currently prevail and which are likely to persist for the foreseeable future. Subject to these caveats, the following definition of "functional harmonization" is proposed.

The Definition

For the purposes of this paper, "functional harmonization" means that condition in which the central core of personal property security laws of all Canadian jurisdictions (federal, provincial, and territorial), other than those aspects of personal property security law dealing with the rights *inter se* of credit grantors and credit users (principally, but not exclusively in the context of consumer credit), as well as including basic features of personal property security registries, are in harmony to the extent that the basic rights of a credit grantor arising out of an agreement to give security in moveable property are substantially the same regardless of the legal structure within which those rights are initially created. The "central core of personal property security law" refers to those aspects of the law which prescribe the priority status of a secured creditor in relation to the claims of other secured creditors, persons who acquire interests in the collateral through purchases occurring after the security interest has been taken or a public notice of an intention to take the security interest has been given (or the equivalent thereof),

unsecured creditors of the debtor enforcing a money judgment under normal judgment enforcement measures, the trustee in bankruptcy of the debtor, and government departments asserting priority for taxes, unemployment insurance deductions, and the like. It refers also to the conflict of laws rules relating to the recognition and perfection of security interests created under the laws of another jurisdiction.

Structural Sources of Disharmony

Bifurcated Legislative Jurisdiction

A distorted picture of the current legal structure affecting Canadian personal property security law results if attention is focussed solely on provincial (including territorial) law. Federal legislation not only affects rights arising under provincial personal property security law,[11] but also provides a legal structure for federal personal property security interests that exist alongside of, and sometimes come in conflict with, security interests created under provincial law.[12] Intraprovincial conflicts between federal security interests arising under section 178 of the *Bank Act*[13] and provincial security interests in the same collateral are currently the cause of considerable concern to financers carrying on business in jurisdictions that have adopted modern personal property security legislation based on Article 9 of the American Uniform Commercial Code. Even if all provinces were to enact substantially uniform personal property security legislation, a major source of disruption and uncertainty in secured financing would remain unless federal personal property security legislation were reformed so as to make it compatible with provincial law.[14]

In terms of reform priorities, it is not difficult to demonstrate that there is a greater need for immediate action to bring federal and provincial personal property security law into harmony than there is to achieve a high level of harmonization of provincial personal property security law.[15] It is conceivable that an acceptable accommodation between federal and provincial law in this area will be worked out by the courts in the context of litigation. However, this will be difficult to achieve because of the fundamental differences between the conceptual bases of the federal system and modern provincial personal property security legislation. What is somewhat surprising is that, although the fundamental changes in provincial personal property security law which exacerbated conflicts with federal security interests were made in at least one important provincial jurisdiction as long ago as 1967, no formal steps have yet been taken to begin the process that would ultimately lead to the necessary changes in federal law. Existing organizations with a mandate to develop uniform personal property security law in Canada

have not been able to induce direct involvement by federal officials in their work.

There is one important deviation from this general pattern. In 1981, the deputy minister of justice for Canada, along with the deputy ministers of justice for all provinces, established the Federal/Provincial Working Group on a Central Registry for Security Interests in Aircraft. Its mandate was to develop proposals for a central registry for security interests in aircraft which would accommodate interests created under both provincial and federal law. Five provinces (Alberta, British Columbia, Ontario, Quebec, and Saskatchewan) and the federal Department of Justice were represented on the Working Group.[16] Meetings were held over a 30-month period, during which a wide range of issues was carefully examined by the Working Group and a consultant. The Working Group prepared preliminary proposals and exposed them to provincial governments and to private organization involved in the aircraft and financing industries. In February 1984, the Working Group presented to a meeting of the deputy ministers of justice a report[17] proposing complementary federal and provincial legislative schemes, which, if enacted by all provincial legislatures and the federal Parliament, would recognize the separate constitutional jurisdiction of each level of government but at the same time would establish a central registry for all security interests in aircraft and accessories. In addition, they would provide for complementary priority rules applicable to conflicting claims to interests in aircraft and accessories, whether arising under federal or provincial law.

It is much too early to judge the exercise as a total success; what is clear is that it cannot be judged as a total failure. At the very least, it provides proof that federal-provincial cooperation in personal property security law reform is possible.

Two Legal Systems: The Civil Law and the Common Law

The fact that the province of Quebec has a legal system with its origins in the civil law of France while all other provinces and territories have systems based on the common law of England has been throughout Canadian history a significant impediment to the development of harmonization of provincial law.[18] In the context of personal property security law, differences between the two systems are fundamental. The civil law lacks the necessary conceptual framework to provide the basis for a system of personal property security law sophisticated and flexible enough to meet the needs of modern business financing of the types carried on in North America.[19]

The same cannot be said of the common law. While it may appear that the plethora of disparate security devices developed in the common law provinces (and still existing in several of them) demonstrates the same

excessive complexity and lack of coherence found in Quebec law, it must be recognized that the law of mortgages and equitable charges, which is peculiar to the common law systems, provided the general conceptual foundation on which modern personal property security legislation rests.[20] The law of mortgages and equitable charges developed as a specialized area of law concerned with securing obligations through non-possessory interests in property. It has an internal consistency and an existence separate and apart from the simple personal property legal concepts of ownership and possession.

The law of Quebec has nothing similar.[21] The only truly generic security interest in moveable property recognized by the Civil Code is the pledge.[22] The hypothec could have provided a conceptual basis for the development of personal property security law; however, until recently, its potential in this regard has been ignored.[23] While other security devices have been developed in Quebec, the only ones that embody a separate concept of "security interest" are creatures of special legislation and are roughly patterned on common law devices.[24]

This is not to say that the evolution of the law of mortgages and equitable charges has kept pace with commercial needs in common law jurisdictions and that only minor legislative adjustments are needed to modernize it. The modern personal property security law recently enacted in four common law provinces represents a fundamental restructuring of this area of the law. However, its adoption did not involve the necessity to accept essentially foreign concepts. The "security interest" of the personal property security acts is a direct, but admittedly much more sophisticated, descendant of the types of interest recognized by the common law and equity courts in the context of mortgages and equitable charges.

The inadequacies of the approach of the civil law to secured financing have been recognized, and measures designed to respond to the needs of modern business financing have recently been put forward. In 1982, the Quebec National Assembly passed *An Act Respecting Transfers of Property in Stock*,[25] which amends *The Bill of Lading Act*.[26] The act, however, represents a continuation of the approach followed by the Quebec National Assembly over the years in dealing with demands for a more functional legal structure for secured non-consumer financing transactions involving personal property as collateral. It does not remove the fundamental deficiency in Quebec law: the lack of a conceptually and structurally integrated approach to this area of the law. It gives to Quebec a rough equivalent of the system embodied in section 178 of the *Bank Act*.[27] Transactions falling within its scope are modified documentary pledges under which debtors transfer their "right and title" in the goods taken as security to creditors,[28] who thereby acquire the rights of an endorsee of a bill of lading.[29] These rights are subject, however, to statutory limitations which recognize the debtor's interest.[30]

When enacting the amendments to the *Bill of Lading Act*, the Quebec National Assembly appears to have ignored, at least for the time being, the recommendations of the Committee on the Law of Security, Quebec Civil Code Revision Office.[31] In 1977, the Civil Code Revision Office proposed revisions to the Quebec Civil Code which, *inter alia*, would recognize the concept of an hypothec in moveable property.[32] One of the general principles underlying the recommendations was that

> . . . any reform of the law on security on moveables must take into account both Article 9 of the American Uniform Commercial Code and the Canadian Provinces' Uniform Personal Property Security Act so that the new rules established to govern real security on moveable property might be consistent with the North American system and general business practice.[33]

The recommendations, if enacted, would result in an integrated system of personal property security law which

> . . . corresponds closely to rules known both in the United States (Uniform Commercial Code) and in other Canadian provinces (Uniform Personal Property Security Act). Conceptual consistency between the law as proposed and personal property security law in several other Canadian provinces would result from the adoption of the concept of hypothec which would constitute only a "charge" on the affected property which gives its holder the right to follow and the right of preference, as does other provinces' Security Acts. The elimination of the chattel mortgage (which granted a title to the affected property) has brought the Anglo-American system on property in line with the civilian system of hypothecs.[34]

It is not entirely clear why the Quebec National Assembly has been so reluctant to seize the opportunity to modernize Quebec personal property security law and at the same time to bring Quebec into the mainstream of developments in this area of the law in North America. However, should the Civil Code be amended sometime in the future so as to implement in substance the recommendations of the Civil Code Revision Office, a major step toward harmonization of Quebec law with that of several other jurisdictions will have been taken.

A Historical Overview

Early Factors Affecting Harmonization

Harmonization of provincial personal property security law appears to have been a matter of little concern in Canada during the latter part of the last century and the early decades of this century. In fact, however, a great deal of harmonization actually existed among the personal property security laws of common law jurisdictions during most of this period, largely because initially there was little legislation directly affecting personal property security transactions. Thus the great bulk of

applicable law was common law and equity law. In a few situations in which a particular "local view" of the law developed, disharmony prevailed only so long as the matter remained in the hands of provincial courts. Appeals to the Supreme Court of Canada and to the Judicial Committee of the Privy Council usually brought an end to the deviance of provincial courts, since both courts regarded the preservation of uniformity in the common law as one of their chief duties. Once a principle of law was established by one or other of the appeal courts, the rule *stare decisis* insured its application by provincial courts. Less formal mechanisms were also influential. The legal profession treated the law of England as being the law of the common law jurisdictions of Canada. This was as much a matter of necessity as desire. The volume of Canadian legal digests, treatises, and case reports was very small, and English sources were indispensable.[35]

This state of affairs changed only gradually during the first two decades of this century. After 1920 change was faster. While the basic attitude toward a uniform common law did not change, an ever increasing amount of personal property security law became statutory, with the result that opportunities for divergence correspondingly increased and the traditional institutional mechanisms for maintaining harmonizations ceased to be as effective. The ultimate point in this process will be reached when only a relatively small part of Canadian personal property security law lies outside the statutes. This point was reached recently in four Canadian jurisdictions.[36]

The Extent of Legislative Harmony Prior to 1930

As noted above, the personal property security law of common law jurisdictions in Canada has had two sources: the rules of the common law (including equity) and legislation. While the former retained a high degree of consistency from jurisdiction to jurisdiction during the period under examination, the latter did not. Statutory personal property security law was prevalent in all common law provinces prior to the turn of the century. The great bulk of it was enacted in order to require public disclosure of security interests in tangible personal property. The chattel mortgage was the principal security device in use, and all but one jurisdiction required its registration. The principal objective of much of this legislation was to prevent a chattel mortgage from being used as vehicle for the perpetration of fraud on other creditors of the mortgagor. It also provided protection to subsequent purchasers dealing with a mortgagor.

Legislative harmonization, as the term is used in this paper, did not exist in Canada during the period under examination. As far as the common law jurisdictions were concerned, the disharmony was not found at the conceptual level but rather in the registry requirements. For

example, in 1900 chattel mortgage legislation of seven common law jurisdictions required registration of chattel mortgages.[37] Of these, three jurisdictions (British Columbia, Nova Scotia and North West Territories) excluded from the registration requirement mortgages given by corporations. Only one act (Ontario) contained a specific requirement that mortgages on after-acquired property be registered. The period of time a mortgage registration remained effective ranged from one year in two jurisdictions (New Brunswick and Ontario) to five years in one jurisdiction (British Columbia). The legislation of Prince Edward Island appears to have provided for perpetual registration.

By 1915, the picture had changed very little. Only one act (British Columbia) had been substantially amended so as to require registration of mortgages on after-acquired property and to eliminate registration renewal. However, substantial changes were made in chattel mortgage legislation during the period 1915–30. An important event during this period was the publication in 1928 of a Uniform Bills of Sale Act by the Conference of Commissioners on Uniformity of Legislation in Canada. By 1930, four provinces had repealed earlier legislation and had enacted, with only minor changes, the Uniform Bills of Sale Act.[38] However, Ontario, with by far the largest population and the greatest amount of commercial activity, did not adopt the Uniform Act.

Statutory incursion into mortgage law was not limited to the enactment of bills of sale legislation. Some of the early statutes requiring public registration of chattel mortgages did not apply to mortgages on the property of corporations apparently because corporate mortgages were to be recorded in a register maintained by the registrar of companies.[39] In other jurisdictions, it was necessary to register under both systems.[40] Generally, registration requirements contained in companies legislation extended beyond chattel mortgages and included any charges, mortgages, or other instruments of a hypothication or pledge of any real or personal property of a company taken to secure bonds, debentures, or other securities of a corporation.[41] For a time, the Dominion Companies Act provided for registration of security interests taken in the property of federally incorporated companies.[42] Measures to bring some order to the complex patchwork of registration requirements for security interests in corporate moveable property surfaced in 1931 in the form of a Uniform Corporations Security Registration Act, published by the Conference of Commissioners on Uniformity of Legislation in Canada and ultimately adopted by six jurisdictions.[43]

The development pattern of conditional sales law was not unlike that of chattel mortgage law. There was one difference: the conditional sales contract did not develop under English common law as a significant security device. The result was that, in Canada, legislation played a somewhat greater role in this area of law than it did in chattel mortgage law. While the early conditional sales statutes were designed primarily to

provide notice to third parties of the existence of conditional sellers' interests in goods in the possession of buyers, many of them also contained provisions giving buyers a right of redemption after default and the right to notice after repossession and prior to sale. The first Canadian legislative regulation of conditional sales contracts as security devices, the *Conditional Sales Act*, was enacted in 1888 in Ontario.[44] It required public disclosure of a conditional seller's interest by a notice affixed to the goods sold or by filing a copy of the sales contract in the county court of the county in which the purchaser resided. In addition, the act specified a redemption period of 21 days after seizure by the seller, during which the defaulting purchaser could redeem his interest. The seller was required by the Act to give to the purchaser a 5-day notice of his intention to resell the goods.

By the turn of the century, all common law jurisdictions had enacted conditional sales legislation, much of it patterned on the Ontario *Conditional Sales Act*. However, even at this early stage, important differences existed among the various acts. In one province, the only method of providing notice of the seller's interest was by affixing the seller's name to the goods.[45] In three provinces, a seller could give the requisite notice to third parties by affixing his name to the goods or by public registration.[46] Registration under all except one of the acts did not require renewal.[47] The acts of four provinces provided for a 20-day period of redemption and a 5-day notice prior to sale.[48]

Refinement and expansion of conditional sales legislation had not progressed significantly by 1915. However, to the extent that they had, further differentiation among the provincial acts resulted. One additional jurisdiction permitted a seller to affix his name to the goods as a substitute for registration and required renewal of registration after a 2-year period.[49] One jurisdiction added provisions for a 3-month redemption period and a 20-day notice prior to sale.[50] Two provinces had amended their acts to provide for preservation of a conditional seller's interest in cases where goods sold were affixed to real property.[51] A "traders" section was added to one act along with a provision extending the scope of the registration requirements to lease-option agreements.[52] One additional act was amended to provide for registration where the goods were delivered to a buyer outside the province.[53] This provision was the first recognition in the context of conditional sales contracts that the movement of goods across provincial boundaries required special attention.

Few changes of significance were made in provincial conditional sales law until 1922, when the Uniform Conditional Sales Act, recommended in that year by the Conference of Commissioners on Uniformity of Legislation in Canada, was adopted in British Columbia.[54] Even then, there appears to have been no strong feeling that a new Uniform Act was necessary. Professor Ziegel notes: "thus the first uniform (conditional

sales) act was launched — but with a whimper rather than a bang, for within the next decade only three provinces adopted it."[55]

Another personal property security transaction that has played a significant role in business financing in Canada is the general assignment of book debts. As with chattel mortgages, until modern personal property security legislation was enacted, the great bulk of applicable law dealing with this type of transaction in common law jurisdictions was not statutory. The common law (in particular, the law of equity) provided for the assignment of debts and prescribed the priority rules applicable in cases of multiple assignments. The picture was quite different in Quebec. As early as 1888, the Quebec Civil Code provided for the sale of debts and rights of action and required the "publication" of general assignments by the deposit of the assignment contract at the district office of the prothonotary.[56]

The first statutory law in common law jurisdictions substantially affecting assignments of book debts was enacted in Saskatchewan in 1912 as an amendment to the Saskatchewan *Bills of Sale Act*.[57] In 1916 an *Assignment of Book Debts Act* was enacted in British Columbia.[58] This legislation required the public registration of assignment of existing or future book debts or any class or part thereof made by persons engaged in a trade or business. In addition, the British Columbia Act provided a statutory rule of priority based on the date of registration of the assignment.

The major impetus for widespread enactment of this type of legislation in all provinces was a provision of the new federal *Bankruptcy Act* of 1919, which empowered trustees in bankruptcy to have declared void certain general assignments of business book debts made by bankrupts unless the assignments were registered pursuant to a statute providing for the registration of general assignment.[59] In 1923, the Supreme Court of Canada ruled that the lack of a provincial registry statute did not save an unregistered assignment from the attack of the assignor's trustee in bankruptcy.[60] Within the next four years, all common law provinces enacted substantially similar legislation requiring registration of general assignments of business accounts. In 1928, a Uniform Assignment of Book Debts Act was published by the Conference of Commissioners on Uniformity of Legislation in Canada. This act was later adopted in its original or amended form by ten jurisdictions.[61]

An examination of legislative developments affecting Canadian personal property security law prior to the time when uniform acts were published not only reveals the extent of actual harmonization of this area of the law but provides some evidence as to the attitude of legislators toward interjurisdictional harmonization as a goal. The general pattern of legislative development in the common law provinces is quite consistent. One jurisdiction, usually, but not always, Ontario, enacted legislation. Other provinces soon followed with counterpart legislation, either in a form copied directly from the original act, or in one derived from

other sources. Although the underlying legislative policy and the basic techniques to realize that policy were usually the same in all jurisdictions, there is no evidence of a generally held belief that interjurisdictional legislative harmonization was important.

The reasons for the lack of any significant interest in harmonization of personal property security law before the 1920s are not difficult to identify. Until the Conference of Commissioners on Uniformity of Legislation in Canada was organized in 1918, there existed no acceptable formal structure or organization through which harmonization could be achieved.[62] However, an earlier start for the Conference would probably not have made much difference. The basic legal principles and structures for most personal property security transactions were drawn from the common law and, consequently, were substantially uniform throughout common law jurisdictions. Provincial economies for the most part were localized. With a few specific exceptions,[63] secured lending transactions were unlikely to involve collateral that would be removed to another province. Evidence of this is found in the fact that, until the uniform acts were adopted in several provinces during the 1920s, most personal property security legislation did not require registration of security agreements taken in another jurisdiction when the collateral under the agreements was brought into the province. The absence of registered requirements in a jurisdiction meant that a foreign security agreement, if valid under the law of the jurisdiction where the collateral was situated at the time of execution of the agreement, was recognized as valid and effectual against third persons in any other jurisdiction.[64] If there had been significant interprovincial movement of property subject to security interests, local pressure would certainly have induced legislation requiring registration of foreign security interests in a province.

The lesson to be learned from a study of the development of personal property security law during the period between the enactment of the first *Bills of Sale Act* in 1854 and the publication of uniform acts in the 1920s is that interprovincial legislative harmonization is not likely to be achieved without a demonstrated need for it and an effective structure through which legislators or their representatives can be brought together to develop legislative models suitable for adoption in all jurisdictions. Canadians see no merit in having harmonization for its sake alone, nor does there exist any force, such as strong nationalism, that induces Canadians to work together with the object of developing a national approach to legislative regulation of this area of the law.

The Influence of Uniform Acts

As has been noted earlier in this paper, between 1922 and 1931 the Conference of Commissioners on Uniformity of Legislation in Canada (hereinafter referred to as the Uniform Law Conference)[65] published

uniform acts dealing with the four personal property security devices most widely used in common law jurisdictions: conditional sales contracts (1922), chattel mortgages (1928), assignment of book debts (1928), and corporation securities (1931).[66] In the following years, some of the uniform acts were amended and others totally replaced.[67] In proposing uniform acts, the goal of the Conference was to promote "uniformity of legislation throughout Canada or in such provinces as uniformity may be found practicable, by such means as may appear suitable to that end."[68]

While uniform acts in their various forms were enacted in whole or in part in many jurisdictions, the goal of uniformity was never realized. On the surface, the record looks impressive.[69] According to a recent report of the Conference, the Uniform Bills of Sale Act was adopted in nine jurisdictions, one or other of the Uniform Conditional Sales Acts was adopted in seven jurisdictions, the Uniform Assignment of Book Debts Act was adopted in ten jurisdictions, and the Uniform Corporation Securities Registration Act was adopted in six jurisdictions.[70] However, as two writers have pointed out, this picture is deceptive.[71]

An accurate assessment of the success of the Conference in attaining the goal of uniform personal property security law throughout Canada necessarily involves more than counting the number of "adopting" jurisdictions. Not all "adopting" provinces enacted the uniform acts in their entirety.[72] Further, the size of population of the adopting jurisdictions should be compared with that of jurisdictions that did not adopt uniform acts. If it can be assumed that the volume of personal property security transactions in a jurisdiction is roughly proportional to the size of the population of that jurisdiction, the decision to adopt or reject a uniform act is much more significant to the goal of national harmonization when that decision is made by a jurisdiction with a large population than it is when it is made by a jurisdiction with a small population. The population distribution is such in Canada that the decision of one large jurisdiction to go its own way will make it impossible to have a significant level of harmonization of personal property security law.

When population is brought into the picture, the record of the Conference looks much less impressive (see Appendix). Based on 1981 population statistics, uniform bills of sale legislation was adopted substantially as recommended in jurisdictions representing 11.68 percent of the population. It was adopted with modifications in jurisdictions representing an additional 2.62 percent of the population, and some of its provisions are to be found in the legislation of jurisdictions representing an additional 3.32 percent of the population. In total, uniform bills of sale legislation has influenced the laws of jurisdictions representing only 17.62 percent of the population. Even these figures may overstate the degree of harmony among adopting jurisdictions.[73] The Uniform Bills of Sale Act was amended twice, revised, and further amended. Not all adopting jurisdictions amended their acts or adopted the revised legislation.

The picture is only marginally better for uniform conditional sales legislation. The seven jurisdictions that adopted a Uniform Conditional Sales Act in whole or in part represent only 13.42 percent of the Canadian population. A greater measure of success can be claimed with respect to the Uniform Assignment of Book Debts Act, which was adopted in jurisdictions representing 62.26 percent of the Canadian population, and with respect to the Uniform Corporation Securities Registration Act, which was adopted in jurisdictions representing 43.63 percent of the population.

The most spectacular feature of the Conference's failure is the fact that uniform personal property security legislation has had no influence on the development of the law of Quebec. This should be no surprise, however, since the great bulk of uniform personal property security legislation profferred by the Conference prior to 1971[74] embodied legal concepts and perfection methods drawn from common law jurisdictions. Until a Uniform Personal Property Security Act was adopted by the Conference in 1971,[75] there appears to have been no interest in developing uniform legislation that might attract interest or support in Quebec. This lack of interest appears to have been shared by the Quebec delegates to the Conference.

It is more difficult to explain the unpopularity of uniform personal property security legislation in the more populous common law provinces, notably British Columbia and Ontario. In 1922, the B.C. legislature adopted the first Uniform Conditional Sales Act. Later amendments to the B.C. Conditional Sales Act were made, some of them in close cooperation with the Conference.[76] In 1961, however, a new B.C. Conditional Sales Act was adopted which was not based on a uniform model.[77] No other uniform acts were adopted in the province, although the B.C. delegation continued to participate in the work of the Conference. The Conference's success in getting acceptance of its proposals in Ontario has been somewhat better, but still well short of impressive, even though Ontario delegates have played an active role in the work of the Conference from its inception.

The decision on the part of British Columbia and Ontario legislators to retain non-uniform personal property security legislation cannot have been based on the conclusion that the non-uniform legislation of their jurisdictions was sufficiently similar to the uniform acts to permit inter-jurisdictional harmonization without the necessity to adopt uniform legislation. While the basic structure of the B.C. and Ontario conditional sales and bills of sale legislation was similar to that of the Uniform Conditional Sales Act and the Uniform Bills of Sale Act respectively, the differences were sufficiently important and numerous to produce a high level of disharmony.[78]

It is clear from the pattern of adoption of uniform legislation that jurisdictions with small populations have been more accepting of the

work of the Conference as it relates to personal property security legislation than have jurisdictions with large populations, (see Appendix). However, overriding interest in harmonization of provincial personal property security law is not likely the reason for this acceptance. Rather, these jurisdictions are less likely than are larger jurisdictions, such as British Columbia and Ontario, to have the necessary resources to devote to the preparation of their own personal property security legislation. This is not to say that legislators in these smaller jurisdictions have ignored the relevance of interjurisdictional harmonization within a region such as that formed by the Maritime provinces. However, the evidence indicates that smaller size and corresponding wealth play a greater role in inducing interest in uniform legislation in a jurisdiction than does the fact that the jurisdiction's economy is closely linked to that of another jurisdiction. For example, the Yukon has adopted all uniform acts dealing with personal property security law, while British Columbia adopted only one, which it later replaced. The pattern of adoption among the Prairie provinces shows no evidence of a strong interest in regional harmonization based on Uniform Law Conference legislation.[79]

The Model Uniform Personal Property Security Act

A history of efforts undertaken in Canada to achieve harmonization of personal property security law would be incomplete without reference to the work of the Special Committee on a Model Uniform Personal Property Security Act (hereinafter referred to as the MUPPSA Committee). Indeed, there is sound basis for speculation that the model personal property security legislation recommended by this Committee will have a much greater influence on harmonization of Canadian personal property security law than have any of the proposals that have originated in the Uniform Law Conference. The Model Uniform Personal Property Security Act prepared by the MUPPSA Committee not only provides a model legal structure that can be readily adapted to meet the current needs of common law jurisdictions for modernization of personal property security law, but, in addition, embodies a conceptual approach to personal property security law which can be the basis for substantial harmonization of both Quebec and federal personal property security law with that of other Canadian jurisdictions.

The background and work of the MUPPSA Committee has been described elsewhere.[80] It is important to note just a few highlights. The Committee was formed in 1963 by the Commercial Law Section of the Canadian Bar Association. Its terms of reference were to make recommendations with respect to the advisability, form, and content of a uniform act on security in personal property. The impetus for creating the Committee came from a desire to explore the possibility of inducing

all provincial jurisdictions to consider a fundamental re-examination of their personal property security law similar to that which was occurring in Ontario at the time.[81] The MUPPSA committee worked in close contact with a committee of the Ontario branch of the Canadian Bar Association, which published a report in 1963 recommending a new Personal Property Security Act for Ontario. This report led ultimately to the enactment of the *Ontario Personal Property Security Act* in 1967.[82] The MUPPSA Committee, which met intermittently over a period of 19 years, had among its members and participating observers representatives from most provinces and all regions of Canada except the Territories. Its work was closely followed by the Canadian Bankers Association and other groups in the Canadian finance industry.

The Committee published a report in 1969, which proposed a Draft Uniform Personal Property Security Act.[83] While the proposed act was similar to the *Ontario Personal Property Security Act* of 1967, it did depart from the Ontario legislation in several important respects.[84] Thereafter the Committee continued in existence principally to monitor experiences under the Ontario act and Article 9 of the American Uniform Commercial Code and to determine what changes, if any, were needed in the 1969 draft act. In 1982, the Committee presented to its parent organization a revised Model Uniform Personal Property Security Act.[85]

In 1980, the Uniform Law Conference appointed a committee to examine the Model Uniform Personal Property Security Act and to report on its suitability as a replacement for the 1971 Uniform Personal Property Security Act.[86] On the recommendation of its committee, the Conference adopted in 1982 the Uniform Personal Property Security Act, 1982, and withdrew its 1971 Act.[87] The new Uniform Act is identical to that adopted in the same year by the Canadian Bar Association following the recommendations of the MUPPSA Committee.

The work of the MUPPSA Committee stimulated interest in reform of personal property security law in several provinces, led to the publication of reports recommending the enactment of legislation along the lines of that proposed by it,[88] and induced enactment of Personal Property Security Acts in Manitoba, Saskatchewan, and the Yukon.[89] As well, the revised Ontario Personal Property Security Act, which has recently been proposed by a committee of the Ontario Ministry of Consumer and Commercial Relations, contains many provisions patterned on sections of the 1982 Uniform Personal Property Security Act.

It remains to be seen whether or not the Uniform Personal Property Security Act will be the vehicle through which harmonization of Canadian personal property security law will be realized. The early indications are encouraging, but the outcome is uncertain. Indeed the adoption of personal property security acts in a few provinces has temporarily exacerbated the problem of disharmony, since the conceptual and struc-

tural differences between the law of a jurisdiction that has adopted the new legislation and a jurisdiction that has not done so are greater than the differences between the personal property security laws of two jurisdictions that retain the old law whether in the form of uniform or non-uniform legislation. Further, the conceptual compatibility that had existed between a personal property security law contained in the federal *Bank Act* and former provincial personal property security law was destroyed in four jurisdictions by the enactment of personal property security acts.[90]

The history of the development of Canadian personal property security law demonstrates the significant interest in reform and the availability of model legislation on which reform can be based does not lead rapidly to interjurisdictional harmonization of the law. Something more is apparently needed to discourage legislators from unwarranted parochialism. While the Uniform Law Conference counts the Uniform Personal Property Security Act, 1982, among its recommended Acts, there is no reason to believe that this fact alone will have much influence on legislators in most provinces.

In 1982 the Uniform Law Conference and the Canadian Bar Association established a joint committee with a mandate, *inter alia*, to monitor the adoption of the Uniform Act in provinces and territories and to encourage adopting jurisdictions to maintain interjurisdictional uniformity by adopting the Act without substantial change.[91] Early indications suggest that the Committee's effectiveness may be limited. Adequate funding for the Committee has not been made available. Unless the Committee is able to function more effectively than it has since its formation, or unless some other organization or group is prepared to carry out its mandate, those factors which in the past have prevented interjurisdictional harmonization of Canadian personal property security law will probably continue to operate. That these factors are still prevalent and influential is demonstrable even in the context of the personal property security acts that have been enacted. The Uniform Act, the Saskatchewan Act, and the Yukon Act contain many provisions that distinguish them from the Ontario and Manitoba Acts.[92] Fortunately, these differences are the result of the fact that the two latter Acts represent a first generation of reformed personal property security law in Canada while the former Acts embody the learning acquired from several years of study and experience that occurred after the Ontario and Manitoba Acts were adopted. Disharmony during an initial period of development of an area of the law is unavoidable. Proposals for changes to the Ontario and Manitoba Acts are now being considered. It remains to be seen whether or not the lack of an active organization devoted to harmonization of this area of the law will result in major differences between the Uniform Act and the revised Ontario and Manitoba Acts.

Personal Property Security Registries

The definition of harmonization set out earlier in this paper made specific reference to those aspects of personal property security law relating to registration systems for security interests. In a modern context, compatibility of substantive personal property security law is not enough. Functional harmonization requires that the basic operational rules of personal property security registries be compatible as well. This aspect of harmonization is likely to be the most difficult to achieve in the near future. Provinces with computerized personal property registries have invested large amounts of money in developing their systems. They will be reluctant to make substantial changes which are costly and disruptive, just for the sake of interjurisdictional harmonization.[93] The picture is much brighter with respect to those jurisdictions which have not yet adopted a personal property security act but which intend to do so in the near future. Because of the high cost involved in the development of registry systems, some of these jurisdictions are looking closely at existing systems with a view to adopting one of them. If all these jurisdictions can be persuaded to adopt one system as a model, a great deal of interjurisdictional diversity will be avoided.[94] An obvious by-product of compatibility among computerized registry systems is the capacity to establish direct links among them so that a single request can involve a search of all registries. However, unless structures are established through which systems designers and registrars can be brought together, it is most unlikely that major advances of this kind in the functional capacity of personal property registries will be realized.

Developments in the United States

Efforts to secure harmonization of Canadian personal property security law have paralleled and, in many respects, been patterned after, similar efforts in the United States. The Uniform Law Conference was no doubt intended to be a Canadian version of the American National Conference of Commissioners on Uniform State Laws (hereinafter referred to as the National Conference), which was organized in 1892 with the objective of "promoting uniformity of state law on all subjects where uniformity is deemed desirable and practicable."[95] From the beginning, the National Conference directed significant attention to uniformity of legislation affecting commercial practices. However, it did not recommend uniform personal property security legislation until 1918, when it published a Uniform Conditional Sales Act. In 1933 it published a Uniform Trust Receipts Act.

By 1940, it became clear that attempts to secure widespread acceptance of uniform commercial law throughout the United States were not

succeeding. In the area of personal property security law, roughly two-thirds of the states had adopted the Uniform Trust Receipts Act of 1933, but far fewer had adopted the Uniform Conditional Sales Act.[96] This lack of success lead to a search for new approaches. In 1940 the decision was made to prepare a comprehensive code of commercial law. In 1944, the National Conference and the prestigious American Law Institute agreed to co-sponsor a Uniform Commercial Code project.[97] The proposed code was designed to cover eight different areas of commercial law including personal property security law. The undertaking proved ultimately to be an overwhelming success. In 1952, a Uniform Commercial Code was promulgated by the National Conference and the American Law Institute and was endorsed by the American Bar Association. Article 9, which deals with personal property security transactions, was later amended in 1956, 1958, 1962, 1966, 1972, and 1977.

While the Uniform Commercial Code was enthusiastically received by almost all state legislators,[98] it became apparent by 1961 that almost every state enacting it was making its own amendments, thus preventing the development of uniform commercial law throughout the United States. In order to discourage local variations, sponsors of the Uniform Commercial Code established in 1961 a Permanent Editorial Board with the mandate to promote uniformity among enacting states, to examine all cases of deviation from the current Official Text of the Code,[99] and to evaluate and prepare proposals for revision to the Official Text. The Board devoted a great deal of effort to improvements in the 1962 Official Text so as to respond to claims that local state variations were needed to remedy inadequacies in Article 9. Its recommendations lead to the promulgation of a 1972 Official Text containing major changes to the earlier text of Article 9. As of January 1984, 43 jurisdictions had adopted the 1972 Official Text of Article 9, while all other jurisdictions, except Louisiana which did not adopt Article 9 in any form, retained the 1962 Official Text. However, adopting states continue to make amendments to the Official Text.[100] This remains a matter of concern to the sponsors of the Uniform Commercial Code.

While the goal of complete uniformity of the personal property security law of all jurisdictions in the United States has not been achieved, the almost universal acceptance of the Uniform Commercial Code, and in particular Article 9, clearly represents a major achievement. For this reason, the American experience bears close examination by Canadians who are interested in approaches that might result in harmonization of Canadian personal property security law. This fact has not gone unnoticed in Canada. The MUPPSA Committee closely followed developments in the United States. The joint Uniform Law Conference–Canadian Bar Association Committee has a role essentially the same as that of the Permanent Editorial Board of Article 9. The conceptual basis of personal property security legislation enacted in

Ontario, Manitoba, Saskatchewan and the Yukon and, the uniform legislation recommended jointly by the Uniform Law Conference and the Canadian Bar Association is identical to that of Article 9 of the Uniform Commercial Code. While the drafting style of the American legislation is quite different, much of the terminology of the Canadian legislation has been borrowed from its American counterpart. To a great extent, the significant differences between Article 9 and the Uniform Personal Property Security Act represent Canadian refinements that may be incorporated in the American Law.[101]

The first Official Text of Article 9 of the Uniform Commercial Code was published in 1952. Within 15 years, 49 states of the United States had adopted it. By contrast, the MUPPSA Committee published its Draft Uniform Personal Property Security Act in 1969, but 14 years later only 4 Canadian jurisdictions have adopted modern personal property security legislation similar to that proposed by the Committee. Given the fact that the models offered as a basis for harmonization of personal property security law were similar in both countries, other factors must account for the relative lack of success on the part of Canadians in reaching the goal of harmonization of this area of the law.

The one factor that more clearly than any other distinguishes developments in the United States in this area of the law from those in Canada is the level of interest in modernized, uniform law displayed by the finance industries and legal professions of the two countries. In the United States, the finance industry played an important supportive role in the development of the Uniform Commercial Code.[102] As well, in the business and legal communities there was an appreciation of the need for modernization and interjurisdictional harmonization of commercial law in general[103] and of personal property security law in particular. The sponsors of the Code responded to a demand, they did not create it.

The Canadian picture has been quite different. No doubt there was some support in Ontario, Manitoba, Saskatchewan and the Yukon for the reform of personal property security law during the period leading up to the enactment of the Personal Property Security Acts in those jurisdictions, since the legislation was in fact enacted. Nor has interest in reform of this area of the law been totally lacking among law reform agencies.[104] Further, the existence of some interest in interprovincial harmonization of personal property security law in Canada is demonstrated by the marginal involvement of the Uniform Law Conference and by the fact that the Canadian Bar Association continued for several years to provide modest funding to cover some of the costs of the MUPPSA Committee.[105] However, widespread support from the finance industry and the legal profession has yet to develop.

The difference between the business communities of Canada and the United States in their support for interjurisdictional harmonization can, perhaps, be attributed to geographic and demographic differences

between the two countries. The small geographic size and high population density of most American states as compared to Canadian provinces produced a situation in which the need for harmonization was much more obvious. It is more likely that the rights of an American financer will be affected by the laws of more than one jurisdiction than is the case with his Canadian counterpart. Thus American financers have more to gain from interjurisdictional harmonization than do Canadian financers.

Another factor cannot be ignored, one which may explain the considerable apathy of the Canadian legal profession. Generally, Canadian personal property security law as it existed just prior to the time that proposals for a Uniform Personal Property Security Act were put forward was better suited to modern business financing than was American law as it existed before preparation of the Uniform Commercial Code. In particular, the law of all jurisdictions, including that of Quebec, made available a broadly based, flexible form of security device known as the floating charge.[106] Further, the chartered banks have had available a very flexible system for taking and perfecting security interests. Section 178 of the *Bank Act* not only permits security interests in present and after-acquired property but, in addition, employs a notice filing system for perfection of these interests.[107] Nothing similar had been allowed to develop in American law. The result was that Canadian lawyers had less reason to be unhappy with local law than did their American counterparts.[108]

It appears likely that the process of change in Canadian personal property security law will continue and that ultimately most, if not all, Canadian jurisdictions will enact legislation based conceptually on the Uniform Personal Property Security Act, 1982,[109] and probably a majority of common law provinces will adopt most of substantive features of the Model Act.[110] However, it is also clear that it will take much longer in Canada than in the United States for this process to be completed. It is much too early to determine whether or not Canadians will be more or less successful than Americans have been in getting interjurisdictional harmonization of substantive personal property security law. While American efforts fell short of the goal of uniformity set by the Uniform Commercial Code's sponsors,[111] the more realistic goal of harmonization has been substantially achieved in the United States.[112]

Some Conclusions

While the importance of interjurisdictional harmonization of Canadian personal property security law was recognized early in Canada, at no time in Canadian history have the laws dealing with personal property security transactions existing in the various jurisdictions, including the laws enacted by the federal Parliament, been sufficiently compatible to reach the level of harmonization described in the definition of functional harmonization set out in this paper. While this can be attributed in part to

the inadequacies of the official organization established to secure legislative harmonization in Canada, it is unlikely that much more would have been achieved if the Uniform Law Conference of Canada had been differently organized or had proceeded in a different manner. Prior to publication of the Uniform Commercial Code, the American equivalent of the Uniform Law Conference of Canada was only marginally more successful in convincing jurisdictions to adopt its proposals for uniform personal property security law. Historical evidence indicates that a need or perceived need for harmonization of law must exist before efforts directed to this end will have much success. Canadian legislators have demonstrated over the years their belief that legislative harmonization for its own sake, or as a vehicle for developing national unity or a national identity, has no merit. They have fully exploited the opportunity provided by a federal constitutional structure to act with a large measure of independence. So long as provincial economies remained localized, with credit grantors carrying on business in one or two jurisdictions only, and so long as secured financing activities originating in one jurisdiction were only occasionally and peripherally subject to the laws of another jurisdiction, a convincing argument for interjurisdictional harmonization could not be made successfully. This appears to have been the case in Canada during at least the first half of this century.

The picture may be changing, however. While no statistical information is available as to the number or dollar value of secured credit transactions affected by the laws of more than one jurisdiction, there is reason to believe that interjurisdictional harmonization of personal property security law is becoming more important. The nature of modern business financing is such as to lead to an increased level of transborder activity. Many consumer and business financing organizations serve markets in several jurisdictions. As major improvements in transportation and communications render the Canadian market for goods and services less fragmented, security interests taken in assets of a business are more likely to become subject to the law of two or more jurisdictions, either because the debtor carries on business in several jurisdictions or because the debtor moves its assets from one jurisdiction to another. Further, as noted earlier in this paper, the enactment of personal property security acts in four jurisdictions has resulted in the need for immediate measures to restructure federal personal property security law so as to avoid direct conflict between the federal and provincial legal systems.

Nevertheless, the case for immediate measures is weakened by the absence of convincing evidence that the finance industry has recognized the need for harmonization of personal property security law in Canada. As far as the writer can determine, no concerted effort has yet been undertaken by Canadian financers to induce provincial and federal legislators to increase significantly the level of harmonization of Cana-

dian personal property security law. The reasons for this apparent apathy on the part of Canadian financers are not easy to identify. It may be that they are relying too heavily upon legal advisors who, because of the parochial nature of their legal training, are unaware of the scope for reform in this area of the law or are disinterested in or hostile to changes that would necessitate re-education on their part or that would permit lawyers in other jurisdictions to give reliable advice as to matters governed by the laws of their jurisdiction. Another possible explanation for the lack of concerted effort on the part of the finance industry to seek harmonization of personal property security law may lie in the dominant position that the chartered banks occupy in the finance market. While the Canadian Bankers Association has displayed a continued willingness to cooperate with the MUPPSA Committee, neither the Association nor any of its member banks has urged provincial legislators to enact the Model Uniform Personal Property Security Act. This lack of enthusiasm may be a result of the fact that a significant portion of the secured business lending activities of chartered banks is governed by federal law, which is substantially uniform in its application in every jurisdiction in Canada. Until recently, the banks have had a much smaller stake than have other financers in securing interjurisdictional harmonization of this area of the law. Indeed, under present circumstances, a chartered bank may have a competitive advantage over a financer who must comply with several disparate systems of law.

The mere existence of a need for harmonization of an area of law does not guarantee that the need will be met. Specific measures must be taken: available expertise must be assembled; a forum for exchange of ideas must be established; and model legislation must be developed. Someone must be given the responsibility to explain the model legislation to legislators, to discourage unwarranted deviation from the models, and to identify weaknesses in the models, which can then be corrected by amendment. As has been noted earlier in this paper, the MUPPSA Committee attempted over a 19-year period to bring experts together and to develop proposals that could form the basis of legislative harmony. The joint Uniform Law Conference–Canadian Bar Association (ULC–CBA) Committee has the mandate to carry those proposals to Canadian legislators and to identify any needs for amendment. However, it would be a mistake to assume that all is well, and that it will be just a short period before the goal of harmonization is achieved. As has been noted above, the joint ULC–CBA Committee has not yet been provided with sufficient funds to carry out its mandate. The problems, however, go much deeper than the mere lack of adequate financial support for the ULC–CBA Committee. The Uniform Personal Property Security Act is a model for provincial legislation suitable for adoption in common law provinces. Because of the failure on the part of the federal government to respond to offers from the CBA Committee to join it in a

coordinated effort, enactment of the Uniform Personal Property Security Act by all provinces would exacerbate, not resolve, the problems of conflict between federal and provincial personal property security law. As well, further functional harmonization at the provincial level will be realized only when fundamental changes in Quebec law are made so as to provide conceptual compatibility between Quebec personal property security law and that contained in the Uniform Act. No specific timetable has been set for bringing about these changes in Quebec law.

Finally, an effective organization with a mandate to pursue harmonization is required. While the ULC–CBA Committee can provide the necessary leadership, it requires greater resources, a broadened mandate, and expanded membership. It must be given the power and the resources to bring together senior federal and provincial civil servants responsible for administration and policy development in this area of the law. In particular, it must be given the mandate to involve representatives from the federal Department of Finance who have responsibility for the *Bank Act* and representatives from the Quebec Ministry of Justice. It is clear that the Uniform Personal Property Security Act will have to be amended in order to facilitate harmonization of federal and Quebec personal property security law with that of other Canadian jurisdictions. It seems unlikely that much progress in this respect can be made without a much increased level of support from the Canadian Bar Association and the Uniform Law Conference of Canada in the form of direct contact with senior civil servants and cabinet ministers.

Notes

This paper was completed in November, 1984.

1. See, e.g, *Re Satisfaction Stores Ltd.*, [1929] 2 D.L.R. 435 (N.S.C.A.); *Century Credit Corp. v. Richard* (1962), 34 D.L.R. (2d) 291 (Ont. C.A.); *I.A.C. v. Laflamme*, [1950] 2 D.L.R. 822 (Ont. H.C.).
2. See Civil Code Revision Office, Committee on the Law of Security, *Report on Security on Property*, 1975, passim; *Report on the Quebec Civil Code*, 1977, Book Four, Title Five: Security on Property.
3. See R.C.C. Cuming, "Consumer Credit in Canada," in *Consumer Credit*, edited by R. Goode (Leydon and Boston: A.W. Sigthoff, 1978), p. 186.
4. This last factor is particularly noticeable in the laws of Saskatchewan. See, e.g., *The Limitation of Civil Rights Act*, R.S.S. 1978, c. L-16, esp. ss. 18, 19–36; *The Exemptions Act*, R.S.S. 1978, c. E-14, s. 5.
5. Federal jurisdiction has not always meant uniformity, however. See *Bankruptcy Act*, R.S.C., c. B-3, ss. 173–98. This portion of the act, which provides for an orderly payment of debts system, is made applicable only when provincial governments elect to have it declared in force in their provinces. See also s. 47(b) of the act.
6. See *Personal Property Security Act*, R.S.O. 1970, c. 344, s. 62, and compare *Personal Property Security Act*, S.S. 1980, c. P-6.2, ss. 62. The Ontario Act permits only redemption. This involves the defaulting debtor paying to the secured creditor the entire accelerated balance of the debt owing. The Saskatchewan Act permits

reinstatement by the debtor. This allows the debtor to escape the effect of an acceleration clause in the agreement by paying the "sum actually in arrears, exclusive of the operation of an acceleration clause."

7. See I.F.G. Baxter, "Conflict of Laws and the Perfection and Priority of Security Interests," in *Aspects of Comparative Commercial Law*, J. Ziegel and W. Foster eds, (Dobbs Ferry, N.Y.: Oceana Publications Inc.; Montreal: McGill University, 1969), pp. 396–409; and J.S. Ziegel, "Conditional Sales and the Conflict of Laws" (1967), 45 Canadian Bar Review 284. Traditionally, the development of conflicts of laws rules (also referred to as private international law) has been left to the courts in common law jurisdictions. Legislation affecting rights arising under a foreign law generally went no further than requiring registration of a foreign security interest in goods brought into the jurisdiction. See e.g., *The Bills of Sale Act*, R.S.S. 1978, c. B-1, s. 13. The traditional approach has been displaced in four jurisdictions where personal property security legislation contains elaborate conflict of laws rules. See *Personal Property Security Act*, R.S.O. 1970, c. 344, ss. 5-8; *Personal Property Security*, S.M. 1971, c. 5/P35, ss. 5-8; *Personal Property Security Act*, S.S. 1980, c. P-6.1, ss. 5-8; *Personal Property Security Act*, O.Y.T. 1980, c. 20, ss. 5-8. See also *Uniform Personal Property Security Act*, 1982, ss. 4-7, and Civil Code Revision Office, *Report on the Quebec Civil Code* (1977), Book Nine: Private International Law, Cert. 33, 39–42.
8. See discussion below dealing with the work of the Uniform Law Conference of Canada and the Canadian Bar Association Committee on a Model Uniform Personal Property Security Act.
9. See Y. Caron, "L'Article 9 du Code Uniforme de Commerce: peut-il être exporté? Point de vue d'un juriste québécois," *Aspects of Comparative Commercial Law*, pp. 374–95; L. Pigeon, "À propos d'uniformité legislative" (1942), La Revue du Barreau 381.
10. See, e.g., *The Labour Standards Act*, R.S.S., c. L-1, s. 56, which was amended in 1981 to provide that unpaid wages due from an employer to an employee are deemed to be secured by a security interest upon the assets of the employer, whether or not these assets are subject to other security interests. The secured interest for wages has priority over any other claim or right in the property, including any other security interests (with a few exceptions) arising before or after the wages become due.
11. See, e.g., *Bankruptcy Act*, R.S.C. 1970, c. B-3, esp. ss. 2, 49, 50, 57, 59, 72, 73, 98–105.
12. *Bank Act*, S.C. 1980, c. 40, ss. 178–80.
13. *Ibid.*
14. See CBA Committee on a Model Uniform Personal Property Security Act, "Submission to the Committee of the House of Commons on Finance Trade and Economic Affairs on Bill C-57, an Act to Revise the Bank Act, 1979."
15. See R.A. Macdonald and R.L. Simmonds, "The Financing of Moveables: Law Reform in Quebec and Ontario" (1980), Revue de droit, Université de Sherbrooke 45 at pp. 122–24.
16. It may be of some significance that the federal Department of Finance has responsibility for the *Bank Act*. Although the Working Group's recommendations call for significant amendments to the Bank Act, federal interests on the Working Group were represented by the Department of Justice.
17. See Federal/Provincial Working Group on Central Registration for Security Interests in Aircraft, *Report* (January 1984).
18. There was early optimism with respect to the possibility of uniformity between Quebec commercial law and that of the other provinces. See, e.g., E. LaFleur, "Uniformity of Laws in Canada", Canadian Bar Association Report, (1915), p. 20, esp. at p. 24. However, this optimism proved unwarranted. While Quebec was represented at the organization meeting of the Uniform Law Conference of Canada in 1918, official representatives from that province did not attend any further meetings until 1942. A representative of the attorney general for Quebec first attended in 1946. The Quebec Civil Code, the Code of Civil Procedure, and a few Quebec statutes contain

provisions similar to a small number of the uniform Acts. See Uniform Law Conference of Canada, Proceedings of the Sixty-Fourth Annual Meeting, 1982, p. 602.

19. See, generally, R.A. Macdonald and R.L. Simmonds, *supra*, note 15; Caron, *supra*, note 9 esp. pp. 377–79.
20. See, generally, W.J. Gough, *Company Charges* (London: Butterworth, 1978), pp. 10–19.
21. Specialized security interests in ships are recognized in Articles 2374 and 2693 of the Civil Code.
22. Quebec Civil Code Art. 1979(c) (pledge of agricultural property) and Art. 1979(e) (pledge of machinery and equipment pertaining to a business). For an analysis of the other "security devices" used in business financing in Quebec, see, R.A. Macdonald and R.L. Simmonds, supra 15.
23. Article 2022 of the Quebec Civil Code provides that moveables are not susceptible of hypothecation except as provided in the Title of Merchant Shipping and Bottomry and Respondentia.
24. See *Special Corporate Powers Act*, R.S.Q. 1977, c. p-16. See, generally, McNamee, "Security under the Special Corporate Powers Act" (1967) Meredith Memorial Lectures 34; R.A. Macdonald and R.L. Simmonds, supra 15, pp. 70–81.
25. S.Q. 1982, c. 55. See, generally, Macdonald, "Inventory Financing in Quebec after Bill 97" (1984), 9 Canadian Business Law Journal 153.
26. R.S.Q. c. 53.
27. 1980, c. 40, ss. 178–80.
28. *The Bill of Lading Act*, R.S.Q., c. 53, s. 11. The legislation is ambiguous on the question as to legal nature of the transfer. See Macdonald, *supra* note 25, at pp. 164-67.
29. *The Bill of Lading Act*, R.S.Q., c. 53, s. 12.
30. *Ibid*, ss. 40, 42.
31. See Civil Code Revision Office, Committee on the Law of Security, *Report on Security on Property*, 1975, passim; *Report on the Quebec Civil Code*, 1977, Book Four, Title Five: Security on Property.
32. *Report on the Quebec Civil Code*, 1977, Art. 290, 340, 317–25.
33. See, Committee on the Law of Security, *Report on Security on Property*, 1975, p. 5.
34. *Ibid*, p. 11.
35. See, generally, J. Willis, "Securing Unformity of Law in a Federal System-Canada" (1943–44), 5 Canadian Bar Review 352, esp. pp. 354–60.
36. See *Personal Property Security Act*, R.S.O. 1970, c. 344 (originally enacted 1967, c. 73, but not proclaimed until April 1, 1976); *The Personal Property Security Act*, S.M. 1978, c. 5/p35 (proclaimed in force September 1, 1978); *The Personal Property Security Act*, S.S. 1978–79, c. p-6.1 (proclaimed May 1, 1981); *The Personal Property Security Ordinance* O.Y.T. (1980) 2nd c. 20 (proclaimed in force June 1, 1982).
37. See R.S.B.C. 1897, c. 32; S.M. 1900, c. 31; S.N.B. 1893, c. 32; R.S.N.S. 1900, c. 40; R.S.O. 1897, c. 148; S.P.E.I. 1878, c. 7; O.N.W.T. 1898, No. 40.
38. S.A. 1929, c. 12; S.M. 1927, c. 3; R.S.N. 1930, c. 5; S.S. 1928, c. 69. New Brunswick passed similar legislation in 1927: S.N.B. 1927, c. 151.
39. See, e.g., R.S.B.C. 1911, c. 20, s. 3; R.S.B.C. 1911, c. 39, s. 102.
40. See, e.g., R.S.O. 1890, c. 35, s. 1, R.S.O. 1914, c. 178, s. 82. See generally, *Gordon MacKay & Co. Ltd. v. Capital Trust Corp. Ltd.*, [1927] 2 D.L.R. 1150 (S.C.C.).
41. *Ibid*.
42. *Dominion Companies Act* S.C. 1914, c. 23, s. 3; S.C. 1917, c. 25, s. 9; S.C. 1924, c. 33, s. 21.
43. See Uniform Law Conference of Canada, *Proceedings of Sixty-second Annual Meeting*, 1980, p. 267. See also Appendix of this paper.
44. *Act Respecting Conditional Sales of Chattels*, S.O. 1888.

45. R.S.M., 1902, c. 99.
46. Stat. N.B. 1899, c. 12; R.S.O. 1897, c. 149; P.E.I. 1896, c. 6.
47. The exception was O.N.W.T. 1897, No. 37, which required renewal after a two-year period.
48. O.N.W.T. 1897, No. 37; R.S.B.C. 1897, c. 169; S.N.B. 1899, c. 12; R.S.O. 1897, c. 149; S.P.E.I. 1896, c. 6.
49. R.S.S. 1908, c. 145.
50. S.N.S. 1909, c. 10.
51. S.O. 1911, c. 30; R.S.S. 1909, c. 145.
52. S.O. 1911, c. 30.
53. S.N.S. 1909, c. 10.
54. S.B.C. 1922, c. 44.
55. J.S. Ziegel, "Uniformity of Legislation in Canada: The Conditional Sales Experience" (1961), 39 Canadian Bar Review 165 at p. 170.
56. See R.S.Q. 1888, Art. 5814 adding Art. 1571(c) to the *Quebec Civil Code*.
57. S.S. 1912–13, c. 46, s. 35.
58. S.B.C. 1916, c. 5.
59. S.C. 1919, c. 36, s. 30.
60. See *Re Inverness Railway and Collieries Ltd.: Royal Bank v. Eastern Trust Co.* (1923) S.C.R. 177.
61. See, *supra*, note 43.
62. As to the value of section 94 of the *Constitution Act*, 1867, which was designed to induce uniform provincial legislation, see L. MacTavish, "Uniformity of Legislation in Canada" (1947) 25 Canadian Bar Review 36, at pp. 39–41.
63. E.g., mortgages on rolling stock: S.O. 1910, c. 65, ss. 2, 25, 26.
64. See J.A. Barron and A.H. O'Brien, *Chattel Mortgages and Bills of Sale*, 2d ed. (Toronto: Canada Law Book Co. Ltd., 1914), pp. 104–106.
65. The organization was formed in 1918 under the name Conference of Commissioners on Uniformity of Legislation in Canada. See generally, L. MacTavish, "Uniformity of Legislation in Canada: An Outline" (1947), 25 Canadian Bar Review 36. In 1974 its name was changed to Uniform Law Conference. In this portion of the paper, the contemporary name of the organization will be used.
66. See, *supra*, note 43.
67. *Ibid.*
68. Article I of the Constitution of the Conference of Commissioners on Uniformity of Legislation in Canada.
69. See Uniform Law Conference of Canada, *Proceedings of the Sixty-fifth Annual Meeting*, 1983, p. 19.
70. See, *supra*, note 43.
71. See J.S. Ziegel, "Uniformity of Legislation in Canada: The Conditional Sales Experience" (1961), 39 Canadian Bar Review 165 at pp. 181–83; E.E. Palmer, "Federalism and Uniformity of Laws: The Canadian Experience" (1965), 30 Law and Contemporary Problems 250, at pp. 258–62.
72. As Professor Ziegel points out: "The fact that non-uniform acts possess features in common with the uniform acts is not surprising and is not necessarily attributable to the work of the Commission, since . . . the Conference bases drafts on existing legislation. The provinces in Canada continually 'raid' each other's statutes." (See, *supra*, note 71, p. 182.) After a detailed study of the success of the Uniform Law Conference in the context of conditional sales legislation, Professor Ziegel concluded that "there are today almost as many difference between Conditional Sales Acts of the ostensible uniform provinces as there are between them and the corresponding legislation of the four non-uniform provinces", *ibid.*

73. See, *supra*, note 43, at p. 278.
74. In 1971, the Conference adopted a Uniform Personal Property Security Act copied for the most part from the Ontario act and the 1969 Draft Uniform Personal Property Security Act. See Conference of Commissioners on Uniformity of Legislation in Canada, *Proceedings of the Fifty-third Annual Meeting* 1971, p. 181.
75. *Ibid.*
76. See generally, Ziegel, *supra*, note 71, p. 172.
77. See S.B.C. 1961, c. 9.
78. See *Conditional Sales Act*, R.S.O. 1970, c. 76, *Bills of Sale Act*, R.S.O. 1970, c. 44, and *Chattel Mortgage Act*, R.S.B.C. 1978, c. 48; *Sale* of Goods on Condition Act, R.S.B.C. 1979, c. 373. Compare Uniform Bills of Sale Act 1962 Consolidation, Uniform Conditional Sales Act, 1962 Consolidation.
79. Manitoba and Saskatchewan have both enacted Personal Property Security Acts, but there are major differences between them. Alberta has yet to adopt a personal property security act, although the matter is under study.
80. See, J.S. Ziegel, "A New Deal in Personal Property Security Law" (1963), 6 Canadian Bar Journal 374; J.S. Ziegel, "A Progress Report on the Draft Uniform Personal Property Security Act" (1968), 11 Canadian Bar Journal 270; J.S. Ziegel, "Uniform Personal Property Security Act" (1971), 2 Canadian Business Law Journal 23–25; J.S. Ziegel and R.C.C. Cuming, "The Modernization of Canadian Personal Property Security Law" (1981), 31 University of Toronto Law Journal 249.
81. For a brief description of developments in Ontario, see Ziegel, "Introduction to the Draft Uniform Personal Property Security Act", contained in Committee on a Uniform Personal Property Security Act, Commercial Law Section, Canadian Bar Assn., *Report*, September, 1969, pp. iii–v.
82. See S.O. 1967, c. 73 (proclaimed in force April 1, 1976). The Ontario act, the uniform acts and the other provincial acts were based conceptually and structurally on Article 9 of the American Uniform Commercial Code prepared jointly by the American Law Institute and the National Conference of Commissioners on Uniform State Laws. However, the drafting style and general basic features of the Canadian legislation are very different from that of Article 9.
83. See Committee on a Uniform Personal Property Security Act, Commercial Law Section, Canadian Bar Assn., *Report*, (September 1969).
84. *Ibid*, pp. vi–xii.
85. See Committee on a Model Uniform Personal Property Security Act, Commercial Law Section, Canadian Bar Assn., *Report* (1982).
86. See Uniform Law Conference, *Proceedings of Sixty-second Annual Meeting* (1980), p. 32.
87. See Uniform Law Conference, *Proceedings of Sixty-fourth Annual Meeting* (1982), pp. 33, 358–420.
88. See, Law Reform Commission of British Columbia, *Report on Debtor-Creditor Relationship*, Part V: *Personal Property Security* (1975); British Columbia, Ministry of Consumer and Corporate Affairs, *Proposed Personal Property Security Act* (1978); Alberta Department of the Attorney-General, Office of the Director of Legal Research and Analysis, *Proposals for an Alberta Personal Property Security Act: Discussion Paper* (November 1978); Law Reform Commission of Saskatchewan, *Proposals for a Saskatchewan Personal Property Security Act*, 1981; Quebec Civil Code Revision Office, Committee on the Law of Security, *Report*, 1975; Nova Scotia Law Reform Advisory Commission, *Study Paper on a Personal Property Security Act*, 1973.
89. *The Personal Property Security Act*, S.M., c. 5/P35 enacted in 1973 (proclaimed in force Sept. 1, 1978); *The Personal Property Security Act*, S.S. 1979–80, c. p-6.1 (proclaimed in force May 1, 1981); *The Personal Property Security Ordinance*, O.Y.T. (1980) c. 20 (proclaimed in force June 1, 1982).

90. R.S.C. 1980, c. 40, ss. 178–80. Security interests taken under section 178 of the *Bank Act* are title based, as are traditional common law security interests. Under modern personal property security legislation, a transfer of title is not necessarily involved in the creation of a security interest. See Model Uniform Personal Property Security Act, 1982, s. 2.
91. See Uniform Law Conference, *Proceedings of the Sixty-fourth Annual Meeting*, 1982, pp. 33–34.
92. See generally, R.C.C. Cuming, "Second Generation Personal Property Security Legislation in Canada" (1981–82), 46 *Saskatchewan Law Review* 5.
93. See *ibid.*, pp. 21–33.
94. The Uniform Personal Property Security Act does not prescribe the type of registry to be established under it.
95. See National Conference of Commissioners on Uniform State Laws, 1974 Handbook, p. 310. See also A. Dunham, "A History of the National Conference of Commissioners on Uniform State Laws" (1965), 30 *Law and Contemporary Problems* 233.
96. For a list of Uniform Acts dealing with commercial law which were adopted by some or all of the states see R. Braucher and A. Sutherland, *Commercial Transactions*, Selected Statutes, x–xi (1964 ed.) Table of Statutes Adopted.
97. See W. Schnader, "A Short History of the Preparation and Enactment of the Uniform Commercial Code" (1967), 22 *University of Miami Law Review* 1.
98. All jurisdictions except Louisiana adopted one or other version of Article 9.
99. In 1966 the Board reported that 337 non-uniform, non-official amendments had been made to the various sections of Article 9. Some sections had been amended by as many as 30 jurisdictions. See Permanent Editorial Board for the Uniform Commercial Code, Review Committee for Article 9, *Final Report*, April 1971, p. vii.
100. For a list of amendments as of 1983 see B. Clark, *The Law of Secured Transactions under the Uniform Commercial Code* (1983), Cumulative Supplement No. 2, Appendix c.
101. See J.S. Ziegel and R.C.C. Cuming, "The Modernization of Canadian Personal Property Security Law" (1981), 31 University of Toronto Law Journal 249, esp. pp. 252–54; P. Coogan and A. Boss, "Uniform Commercial Code Treatment for All Leases". *Bender's Uniform Commercial Code Service, Secured Transactions*, Vol. 1, Charter 4.3.
102. "Many of the country's largest banks made generous subscriptions [to a fund to cover the cost of preparing the Code] as did a number of the country's largest and most prominent corporations. Business and financial concerns were interested not only in having the law relating to commercial transactions updated, but particularly were they interested in the prospect of having uniform state laws throughout the nation dealing with these subjects." Schnader, *supra* note 97, pp. 4–5.
103. See, *supra*, note 95 at p. 246. A. Dunham, "Unification of Law in the United States" (1965), 30 Law and Contemporary Problems 21, at 246.
104. See, *supra*, note 88.
105. The continued existence of the MUPPSA Committee over a 19-year period is due almost exclusively to the dedication of a few of its permanent members and, above all, its chairman, Professor J.S. Ziegel of the University of Toronto Faculty of Law.
106. See, generally, W.J. Gough, *Company Charges* (London: Butterworth, 1978). See also *The Special Corporate Powers Act*, R.S.Q. 1977, c. p-16.
107. *Bank Act*, S.C. 1980, c. 40, s. 178.
108. For example, in 1967 a bill was introduced into the Alberta Legislature which was a verbatim copy of the Ontario *Personal Property Security Act* (See 1967, Bill 25). In 1968 a Calgary committee of lawyers issued a report recommending against adopting of the Ontario Act and expressing general satisfaction with existing law.
109. This conclusion is based on responses received by the author from top government officials of jurisdictions that have not yet enacted a personal property security act.

110. Recently both Alberta and British Columbia have implemented computerized notice registration systems for security interests without adopting a personal property security act. However, senior officials in both jurisdictions have indicated that it is the policy of their governments ultimately to adopt the Uniform Act.

111. See J.J. White and R.S. Summers, *Uniform Commercial Code*, 2d ed. (St. Paul, Minnesota: West Publishing 1980), p. 21.

112. *Ibid.*

Appendix

TABLE 3A-1 Uniform Acts Relating to Personal Property Security Law Adopted in Canadian Jurisdictions

Uniform Acts and Year First Published	Jurisdictions											
	B.C	Alta.	Sask.	Man.	Ont.	Nfld.	N.B.	P.E.I.	N.S.	N.W.T.	Yukon	Que.
Bills of sale 1928	—	SR (1929)	E (1957)	E (1929, 1957)	—	M (1955)	S	S (1947)	E (1930)	M (1948)	M (1954)	—
Conditional sales 1922	—	—	E (1957)	—	—	E (1955)	E (1927)	S (1934)	E (1930)	M (1948)	E (1954)	—
Assignment of book debts 1928	—	E (1929, 1958)	E (1929)	E (1929, 1951,1957)	E (1931)	E (1950)	E (1952)	E (1931)	E (1931)	E (1948)	E (1954)	—
Corporation securities registration 1931	—	—	E (1932)	—	E (1932)	—	—	E (1949)	E (1933)	M (1963)	E (1963)	—

Uniform Acts and Year First Published	Adopted Substantially in Total			Adopted with Modifications			Similar Provisions in Force		
	No. of Juris-dictions	% of Pop.[a]	% of Pop. in c/1 Provinces	No. of Juris-dictions	% of Pop[a]	% of Pop. in c/1 Provinces	No. of Juris-dictions	% of Pop.[a]	% of Pop. in c/1 Provinces[a]
Bills of sale 1928	3	11.68	15.87	3	2.62	3.56	2	3.32	4.52
Conditional sales 1922	5	12.78	17.33	1	0.19	0.26	1	0.45	0.63
Assignment of book debts 1928	10	62.26	84.62	—	—	—	—	—	—
Corporation securities registration 1931	5	43.44	59.07	1	0.19	0.26	—	—	—

Source: Uniform Law[a] Conference of Canada Proceedings of Sixty-Second Annual Meeting, 1979, Table III.

Note: For the purposes of comparison, it is necessary to assume that provinces that have adopted Personal Property Security Acts have not done so and have retained the personal property security legislation in force prior to the date when the new legislation was enacted: Ontario, 1967; Manitoba, 1973; Saskatchewan, 1980; Yukon, 1982. There is little likelihood that any of these jurisdictions would have enacted a Uniform Act after 1967.

a. Population figures are based on 1981 Census of Canada, Vol. 1, Table 1, Statistics Canada, Minister of Supply & Services, 1982.

E = Act enacted, substantially in total
M = Act enacted with modification
S = Similar Provisions in force
SR = Version of Act since revoked by Conference

4

Harmonization of Canadian Insurance Law

MARVIN G. BAER

Scope

This paper is primarily concerned with the harmonization of "private" insurance law. It excludes such general social welfare schemes as unemployment insurance, health insurance and workers' compensation.

It is not an easy task to define the essential differences between private insurance and general social welfare schemes administered by government agencies. Tests for such features as whether the insurance scheme is universal, mandatory or government run are not comprehensive. For example, some kinds of social insurance such as health insurance are not, at least in theory, universal, and at least one kind of private insurance, namely automobile insurance, is mandatory in several provinces. Nevertheless, it is possible to identify several main differences between social and private insurance, including the following:

- Social insurance schemes tend to be universal in application as opposed to risk selecting. This means the application procedure for social insurance is less critical and there are few, if any, problems of form and formation similar to those involved with a private insurance contract.
- The long-standing preoccupation in private insurance with protecting the public from the social evil of gaming is of little significance in social insurance.
- Since the state is the carrier in social insurance, there is no need for elaborate rules and machinery to guarantee the carrier's solvency.
- Since all intermediaries in social insurance schemes are civil servants, there is usually a different kind of administrative or judicial supervision of them.

This list indicates why the nature of legal regulation of private insurance is fundamentally different from that of social insurance schemes. However, there is another difference which is significant for the purpose of this paper. With the important exception of workers' compensation, the main types of social insurance schemes in Canada either are administered by the federal government (unemployment insurance) or are cases where the federal government has used its funding as a leverage to secure a considerable degree of harmonization of provincial law and administration (health insurance).

Provincial Jurisdiction over Insurance Law

Legislative intervention in insurance matters by several provincial governments first occurred before Confederation.[1] Hence it may seem remarkable that no specific mention of the subject of insurance appeared in the Constitution Act, 1867.[2] The explanation for this omission probably lies in the fact that before Confederation the Canadian insurance business was on a comparatively small scale.[3] It grew rapidly in the decades immediately following Confederation.[4] At the same time, the need for government regulation of this growing industry became apparent in the years immediately following Confederation with the dramatic failures of several large insurance companies in both the United Kingdom[5] and the United States.[6]

These foreign developments prompted concern about the solvency of Canadian insurers. This was one instance where Canadian legislators did not just smugly assume that the excesses of the American marketplace did not exist in Canada. Their willingness to act may be explained by the fact that the Canadian industry was dominated by American and British insurers[7] and the spectacular failures of the Albert Life Assurance Company and the European Assurance Society in the United Kingdom demonstrated the potential danger even in a country with a well developed, reputable industry with a long history of self-regulation.

Parliament was induced to act by other factors which were widely discussed at the time but have sometimes been overlooked in recalling this history. These included the desire to promote local investment and the need for additional tax revenue. In any event, the infant Dominion Parliament began to assert legislative control over the small but growing insurance business in 1868,[8] two years before the British parliament responded to public concern.[9] By 1879 at least 31 statutes had been enacted. While 25 of these were simply directed at the incorporation of individual companies, the remaining six were of a more general nature designed to promote solvency, direct the investment of insurance funds in Canada and raise tax revenue.

Meanwhile the concern of the provinces, particularly Ontario, centred on the unconscionable or unfair marketing practices and harsh

contractual terms which had developed in the property and casualty insurance field (which at the time was primarily fire insurance). A royal commission was appointed by the province to look into these matters in 1875[10] and, following its report, Ontario passed "an Act to secure uniform Conditions in Policies of Fire Insurance".[11] The constitutional validity of this provincial legislation was upheld by the Privy Council (and all lower courts in Canada) in 1881 in *Citizens Ins. Co. of Canada v. Parsons*,[12] a case which was subsequently used in a series of Privy Council cases in the next century to rebuff repeated attempts by Parliament to assert control over aspects of insurance.

Between 1916 and 1932, the Privy Council invalidated three legislative schemes by which the Dominion sought to assert its power over insurance.[13] All of these schemes were primarily designed, through licensing, reporting and the control of investment, to promote the financial solvency of insurers and to raise tax revenues, although the 1917 scheme also set out a system for regulating the form and content of insurance contracts. In these decisions the federal government failed to establish the trade and commerce clause as an effective source of power in relation to insurance. Moreover, although it invoked almost every conceivably relevant provision in the Constitution Act (e.g. Criminal Law, Aliens, Bankruptcy and Insolvency, Immigration and Taxation) by legislation carefully framed as "aspects" of those subjects, all such attempts were unmasked as colourable purposes which in substance dealt with the business of insurance within the provinces.[14]

As a result of these decisions, the authority of the provinces to legislate in relation to insurance seemed clearly established by 1932. Yet, in spite of repeated rebuffs by the courts, the initial reaction of the federal government was to try once again to assert federal authority.[15] The federal government was urged to do this by the Superintendent of insurance for Canada and also had the support of many of the provinces which preferred regulation by the federal government to regulation by Ontario or Quebec. At one point the prime minister threatened to go over the heads of the provincial governments and seek a constitutional amendment to establish federal authority. However, in the face of strong opposition from Ontario and Quebec, the prospect of further litigation and the changing attitude of the life insurance industry, the government reached an agreement with the industry behind the back of its own long-time bureaucrat, Superintendent George Finlayson, and introduced new legislation in 1932. Subject to minor amendments, this legislation has continued in substantially the same form until the present day. The changes introduced by this legislation were described by the Select Committee on Company Law of the Ontario Legislative Assembly[16] in the following way:

> In 1932 one of the more significant changes took place when the Dominion Insurance Act was repealed and replaced by three new Acts, the Canadian

and British Insurance Companies Act, the Foreign Insurance Companies Act and the Department of Insurance Act. These three new Acts dealt with substantially the same matters as the former Insurance Act but in a different format except that some previously offending provisions of The Insurance Act relating to statutory conditions in life insurance contracts; advertisements of capital and surplus; agent's commissions and salaries; estimates of dividends; and approval of policy forms had been deleted. . . .

In sum, in 1932, the Federal Acts excluded references to the condition of insurance contracts, concentrating instead on matters relating to the solvency of companies registered under the Acts. . . .

Broadly the Federal Government now concerns itself almost exclusively with the financial soundness of non-Canadian companies and of Canadian-incorporated companies which are registered federally. The provincial authorities concern themselves with these and all other insurance matters.[17]

Some writers[18] have described this history as a constitutional clash between a provincial laissez-faire economic philosophy which relied on free entry and competitive market forces to promote marketing integrity, innovative and superior products (and presumably, although the authors wisely do not assert this, solvent insurers) and a federal interventionist philosophy which relied on regulation rather than competition. Such a consistent clash of philosophies over such a long period of time and regardless of the party in power would have been truly remarkable. However a more accurate picture of this history would be that, at least initially, the two levels of government were concerned about different things. There was no inherent incompatibility between federal and provincial legislation at the time of the *Parsons* case.[19] In the area of its initial concern the Ontario government was no more adverse to regulation than the federal government and its initiative was not opposed by the federal government which was not represented by counsel in the *Parsons* case. When the federal government did attempt to expand its control over the insurance industry in the 20th century it was vigorously opposed by Ontario and Quebec. In the resulting political struggle, bureaucrats and industry representatives were major players and their perceived interests were more important than political philosophy.[20] In any event, provincial opposition to federal regulation was not based on any view that the need for regulation was not real or that the proposed federal schemes were inappropriate or unworkable. The suggestion that "the implicit judicial choices underlying the constitutional controversy were between an emphasis on insurance regulation aimed at the status of insurers as financial intermediaries or on the product — the insurance Contract"[21] overlooks the fact that both levels of government had introduced legislation using both approaches. Nor were there significant regional differences which would explain different attitudes and priorities in the regulation of insurance. While the industry was largely located in Ontario and Quebec, this did not lead these provinces to take a more protective or less interventionist attitude toward insurers.

These factors are important in understanding why, in spite of the fact that the federal constitutional authority over insurance has been narrowly restricted, the federal government in practice performs a significant role in regulating major aspects of the business. They also help explain why the particular division of powers worked out by the courts has not been the subject of political tension between the two levels of government for the last 40 years.

The Nature of Insurance Regulation

Canadian insurance regulation since Confederation has focussed on five main areas. These include:

1. regulations designed to guarantee the financial solvency of insurers;
2. attempts to promote Canadian ownership of insurers and investment by insurers in Canada;
3. creation of tax revenues;
4. regulations designed to promote marketing integrity and improve the insurance contract; and
5. regulations designed to promote the honesty and competence of insurance intermediaries.

Solvency

In the year following Confederation, Parliament, prompted by spectacular failures of several large insurance companies in the United States and the United Kingdom, intervened to promote the solvency of insurers.[22] The Province of Ontario passed similar legislation in 1876,[23] and most provinces now have comparable legislation.[24] This legislation promoted solvency by controlling the creation of domestic insurers and licensing foreign insurers, limiting the types of investments insurers could make, providing for the periodic filing of financial information and giving a government department authority to ensure compliance. These mechanisms went far beyond the more limited steps later taken in Britain to protect the public through greater publicity of insurers' investment activities.[25] Later they included the creation or recognition of rating bureaus to improve the actuarial soundness of underwriting decisions and, in the case of a few provinces, the creation of administrative boards to encourage minimum or adequate rates which were reasonable and non-discriminatory.[26]

Several factors explain why the insurance industry was singled out for such unusual public control. First there was the historical fact that in the 1860s and 1870s public confidence had become badly shaken by the bankruptcy of several insurance companies. Second, legislators perceived that aggressive short-term price competition was not in the public interest since this discouraged insurers from providing sufficiently for

future losses. Third, most life insurance was "permanent," that is, involved a significant savings component as well as pure insurance, and even property and casualty insurance involved the management of large pools of prepaid premiums. Hence the need arose to insure the honesty and competence of the fiduciaries managing these funds.

There is little doubt that in the latter part of the 19th century the preservation of the financial soundness of insurers was seen as the most important purpose of government regulation.[27] By and large, this function has been served so well that we tend to overlook its importance today. Yet it remains the major function of the various provincial Superintendents of insurance, and compliance by the insurance companies is for them the most onerous aspect of governmental regulation. Even so, as the recent insolvency of several property and casualty insurers has shown,[28] the system now in place is not foolproof. Renewed interest in strengthening public control over insurers may pose some risk to the degree of harmonization in the regulation of insurers that has been achieved in the past 50 years.

Since this type of government regulation has such a major impact on insurers, it may be worthwhile to identify the potential consequences of a failure to harmonize provincial laws. In the first place, for the majority of larger insurers doing business in most of the provinces, responding to the reporting, inspection and investment directives of up to ten different jurisdictions would be burdensome. How burdensome is not easy to gauge. We can get a rough idea of the government expense involved from the present budget of the federal Department of Insurance. However, the cost to industry of multiple reporting is more difficult to assess and we can only speculate about the cost of the balkanization of investments. At the same time, government resources devoted to compliance would be spread very thin if jurisdictions duplicated each other's auditing and inspection efforts. Finally, there exists the possibility that insurance industry havens could develop in some provinces, either frustrating the attempts of other provinces to promote a financially sound industry[29] or leading to protective restriction on interprovincial business.

Canadianization

One aspect of the early federal legislation designed to promote a financially sound industry has not attracted much attention. The legislation passed in 1868, 1875 and 1877[30] contained provisions requiring foreign companies to maintain sufficient assets in Canada to meet their Canadian obligations. The intention was that should a foreign company become insolvent, the Canadian assets could be used to induce another company to continue its Canadian business.[31]

While the justification for these provisions was the protection of Canadian policy holders, they also prevented the expatriation of large

amounts of investment capital. The effect on the Canadian life insurance industry was dramatic. Almost half of the foreign companies withdrew from the Canadian market.[32] This withdrawal enabled Canadian companies to expand their share of the market from 12 percent (1868) to 63 percent (1893) in just 25 years.[33]

There does not appear to have been any parallel development at the provincial level to promote either local investment or local ownership. Nor does there appear to have been any provincial philosophy opposed to the Canadianization of the industry.

Government Revenue

A significant result of early federal regulation of the insurance industry was the creation of relatively substantial tax revenues. For example, in 1869 and 1870 insurance companies paid $1.8 million and $2.65 million to the federal treasury. These figures represented 12.9 percent and 17 percent of the federal government's total revenue for the two respective years.[34] The relative significance of these tax revenues has declined over time.[35] In spite of the former significance of this tax revenue, it does not appear to have been, nor is it today, a serious source of tension between the two levels of government.

Regulating the Contract

At the time that the first federal acts dealing with the financial soundness of the insurance industry were passed there was also widespread public criticism of the marketing practices and the content of insurance policies, especially life insurance. Early federal legislation did not address these problems. However, by 1875 these concerns had become so prevalent that the Ontario government appointed a royal commission[36] to examine the marketing and terms of fire insurance policies sold within the province. As a result of the royal commission's report, Ontario passed "an act to secure uniform Conditions in Policies of Fire Insurance"[37] in 1876. This act set out standard terms for fire insurance policies; variation of these terms was permitted, but such variation could be disallowed if a court found them not to be just and reasonable. The act was not without precedent. Connecticut had adopted a voluntary form about 1860 and Massachussets had adopted a mandatory statutory fire insurance policy in 1873.[38] However, the widely copied New York standard form was not adopted until 1887 (even though it became known as the "1886 form"). The provinces' constitutional authority to regulate insurance contracts was affirmed by the judicial committee in 1881,[39] but this did not prevent the federal government from attempting in 1886[40] to deal with some of the obvious injustices found in life insurance contracts. The act provided *inter alia* that terms not fully set out in the policy

were void and no misstatement in any application form would void the contract unless such statement was material. There were other embryonic attempts by Parliament, particularly in the Insurance Act of 1917,[41] to regulate the form and content of insurance contracts, but all such attempts were declared *ultra vires* by the courts. Since the Supreme Court of Canada decision in *Reference re Section 16 of the Special War Revenue Act*,[42] Parliament has not attempted to regulate the form and content of insurance contracts. Meanwhile provincial regulation of the form and content of insurance contracts has become more comprehensive, although the form of this regulation varies among different types of insurance. The provincial acts contain few provisions which apply to all types of insurance. Instead, they treat separately fire, life, automobile, accident and sickness, and in some provinces, livestock and weather insurance. This legislation contains significant changes to the common law. However, the amendments to the common law are often quite different for the different types of insurance mentioned and the common law continues to apply to other kinds of insurance.

In the case of fire insurance, provincial statutes provide statutory conditions which must be part of every insurance contract. No variation is allowed, although insurers are free to define the risk through suspensive rather than promissory conditions. In the case of automobile insurance a combination of protective devices is used. Not only do the provincial statutes contain mandatory policy conditions but they also allow other parts of the policy to be provided by regulation. In addition they provide that no application or policy form can be used unless it has the approval of the Superintendent of Insurance. In each province the Superintendent has approved only one set of forms.

Other types of property and casualty insurance are regulated in a far less comprehensive way. However, because property and casualty insurance is usually sold to consumers in comprehensive contracts, insurers often apply the statutory conditions from the fire part of the acts to all insured risks.

In the case of life insurance, the acts do not follow the model of mandating statutory conditions. Instead they follow a more traditional legislative practice of directly prohibiting certain practices and granting certain rights, but otherwise leaving the contents of the insurance policy to be determined by individual insurers or the industry.

Other types of personal insurance, namely accident and sickness insurance, have been regulated for a shorter period of time and the legislation combines features from both the fire and life parts, while newer forms of insurance, such as group life insurance and credit life insurance, are left to be regulated by industry guidelines.

The differences in approach which I have just briefly described, plus the more numerous differences in detail, are not the result of deliberate policy decisions. Often they are anomalies which have resulted from piecemeal

legislation drafted at different times by different branches of the industry or different committees of the Association of Superintendents.

Control over Insurance Intermediaries

Historically, insurance contracts have been sold and serviced and insurance claims have been processed by intermediaries who have enjoyed, at least in the eyes of the law, some independence from insurers. These intermediaries have historically been separately identified as agents, brokers and adjusters, although in recent years many new titles have been invented by the industry to emphasize the competence, integrity and independence of these intermediaries. The legal and practical distinction between agents and brokers is neither very apparent nor real, but broker is the term usually applied to an agent who has an arrangement to sell insurance for more than one company. The practice of using intermediaries is no longer universal, if it ever was, since many insurers market and service their contracts with their own employees. This variety might suggest that marketing considerations are more important than legal ones in the insurer's determination of whether to use independent intermediaries. However, the legal protection that insurers have enjoyed by being insulated from the incompetence, dishonesty and overzealousness of insurance brokers and agents has made the need for public control of these intermediaries more acute.

As with the regulation of the insurance contract, the regulation of insurance intermediaries has varied between the personal insurance industry, particularly life insurance, on the one hand, and the property and casualty insurance industry on the other.

In the life insurance industry, the licensing of agents in several provinces has been based on two principles: first, single-company representation and second, company sponsorship of applicants for agency licences. The first principle means that under several provincial acts,[43] a life insurance agent can be licensed to act as an agent for no more than one insurer transacting life insurance.[44] In contrast to other areas of insurance, these provincial acts do not allow a person to be licensed to act as a life insurance broker.

The system of single-company representation was instituted some 50 years ago in all provinces except Quebec, and seems to have been unique to Canada. The system is no longer required by the legislation in all common law provinces as two provinces have repealed the legislative provision requiring single-company representation and four other provinces have suspended it for all life agents who have been licensed for at least two years.[45] However, these provinces do not prohibit the practice. The changes only mean that a life agent's actions are governed by his contract with his sponsoring insurer rather than by legislation. The Ontario Select Committee has recently canvassed the alleged advan-

tages and disadvantages of the single-company representation requirement and has recommended that it be removed entirely as a compulsory requirement in the act. However, the committee also recommended that sponsoring insurers should be permitted to continue to use the single-company representation system or a modified system by means of its contractual relationships with its own agents.[46] The committee was not prepared "at the present time" to recommend that the act be changed to provide for licensed brokers. If these recommendations are adopted, Ontario law will be brought into line with the law of the majority of Canadian provinces.

The second principle of company sponsorship of applicants for agency licences has resulted in the Superintendents delegating most of the responsibility for the selection and training of agents to individual insurers. However, this delegation has occurred without express statutory authorization in most provinces and without the creation by statute of the usual organizations for self-regulation. In some provinces licensing prerequisites are set out in regulations, and in several provinces applicants have been required in recent years to sit a standard qualification examination approved by the Association of Superintendents. However, basic training is still concentrated within the companies. As a result, the Ontario Select Committee was told that:

> Training varies considerably, even in the same company, depending on the skills and attitudes of the trainers. Responsibility for training is not consistently defined across the industry. This diversity in training and consequent skills is often not recognized by the consumer.[47]

As the Select Committee also observed, most of the training occurs after the agent is licensed, and the Superintendents are not directly involved in this.

Even in those provinces which have adopted the standard examination approved by the Association of Superintendents, there are waiver of examination privileges which vary from province to province. Moreover, this standard licensing examination has a limited purpose which was described by the Ontario Select Committee in the following way:

> The initial licensing examination is an objective multiple choice examination which is a test of factual knowledge and does not require problem solving or expressions of opinion. Its purpose is to ensure that the applicant has an acceptable level of knowledge of how life insurance works and the laws applicable to life insurance contracts and to agents.[48]

While the Superintendents do not participate in the continuing education of agents, they do receive and investigate complaints made against agents and do have the power to revoke licences. The largest number of complaints about both life and other-than-life agents in recent years seem to come from insurers rather than consumers and involve the misappropriation of pre-

miums. There are no published standards for the handling of these complaints and only very summary reports of their number and disposition. However, the fact that the actual continuing supervision by Superintendents may vary across the country has not yet been expressed publicly as a concern by the Association of Superintendents.

To some extent national standards of conduct for agents are established by associations of insurance agents such as The Life Underwriters Association of Canada (LUAC). In its presentation to the Ontario Select Committee the LUAC, after summarizing its code of ethics, described its enforcement of the code in the following way:

> LUAC investigates complaints pertaining to contravention of the code of ethics, contravention of the constitution and by-laws of LUAC, violation of life insurance laws and any detrimental act or omission not specifically covered under any of the above. Members who are found guilty are subject to reprimand, suspension of membership privileges for a specified period or expulsion from membership. In all cases where the member is found guilty LUAC prepares a synopsis of the file and forwards it to the provincial Department of Insurance for its information.[49]

There are now two basic approaches in Canada to the regulation of agents "other-than-life." Two provinces have adopted the concept of self-regulation.[50] In these provinces legislation has created associations whose governing bodies have statutory authority to set admission standards, promulgate rules of conduct and establish discipline procedures. In the remaining provinces, the provincial Superintendents of Insurance are formally in charge of licensing agents and brokers but, as with the case of life agents, they rely on the industry to provide the necessary training. The Association of Superintendents has approved a standard other-than-life examination which has been adopted in six provinces, but even among these provinces the varying waiver of examination privileges means that the qualification procedures and standards are not uniform.

Finally, in the case of insurance adjusters, there is considerable variation in detail in the licensing qualification standards set by the Superintendents. There are no standard study materials or examinations approved by the Association of Superintendents. Yet most provinces follow the pattern of requiring applicants to be sponsored or recommended by a licensed adjuster.

Direct Control over Marketing Practices

For the most part the marketing of insurance is exempt from general provincial legislation (such as the Business Practices Act) designed to promote integrity in the marketing of goods and services. Insurance is treated as a special case requiring unique treatment. Nevertheless, the

insurance acts of several provinces, including Ontario, have specific prohibitions against unfair or deceptive acts and practices in the business of insurance, which parallel general trade-practice legislation. In the Ontario statute,[51] unfair acts or practices are not defined but a list of included examples is set out in the legislation. The Superintendent is given the power to investigate and to order persons to cease engaging in offensive practices. Penalties are provided for any person who contravenes an order of the Superintendent.

The Form of Insurance Regulation

In order to assess the degree of harmonization of provincial law it is necessary to understand the form of provincial insurance regulation. There are at least three levels of regulation involving different bodies of lawmakers. These include legislation, regulations made by the Lieutenant Governor in Council, and guidelines or directives issued by the Superintendents. Of course the Superintendents have the primary responsibility for bringing about changes at all levels and no rules are made at any level without extensive consultation with the industry. But the degree of public discussion and political accountability varies considerably, as does the formality of the rule-making process and the amount of attendant publicity.

These three levels of rule making are contemplated by the legislation in most provinces. However, in the case of some guidelines or directives issued by the Superintendents it is not always easy to identify the legislative source of the Superintendents' authority. The Superintendents seldom cite the source of their authority in issuing directives and many of these directives appear to be voluntary, without mechanisms to ensure compliance.

In recent years both the Superintendents and the industry have seemed to favour guidelines over legislation or formal regulation. In some cases this may be because guidelines can more readily be used to mask fundamental disagreement, to give the appearance of a solution while tolerating inconsistent behaviour in a way that legislation or formal regulation would not permit. That is, some guidelines are so vague (e.g., credit life insurance) or so obtusely worded (e.g., mass marketing) that it is often impossible to tell whether the guidelines have been breached. However, in most cases guidelines are favoured because they are seen as more flexible, less obtrusive and less likely to be "misinterpreted" by the courts.[52] The last two characterizations require additional comment. In reality guidelines are only less obtrusive to the extent that they are voluntary. Yet so great is the aversion to more government regulation by some parts of the industry that they seem willing to comply with such guidelines in order to avoid more formal kinds of law. Thus, by doing what is asked of them they remain free from being ordered to do it.

Guidelines are less likely to be misunderstood by the courts largely because they are not seen as giving rights to members of the public. Hence they are not likely to be the subject of litigation. However, if courts were to interpret them in an unexpected or undesirable way, they could be easily amended by the Superintendents. Obviously it is much easier for the Superintendents to establish uniform guidelines than uniform legislation or formal regulation. Uniform guidelines can be adopted without being vetted by other government departments, or scrutinized by cabinet or its committees, and without having to compete for parliamentary time.

How Harmonization has been Accomplished

Delegation

A remarkable degree of harmonization of provincial regulation has occurred in a number of ways. Perhaps the most significant aspect of government regulation is that which relates to the financial integrity of insurers. Multiple licensing, reporting and investment requirements would be an enormous burden on the industry, could lead to conflicting assertions of jurisdiction or legislative competence and would dissipate enforcement efforts. These potential problems have been avoided by the provinces relying on the supervision of the federal Department of Insurance over all federally registered insurers and making reciprocal arrangements so as to avoid duplication in the supervision of provincially incorporated insurers.

In some provinces, such as Nova Scotia, the delegation to the federal government is complete. Section 5(1) of the Nova Scotia Insurance Act[53] reads:

> 5(1) Unless an insurer holds a certificate of registry that is in force under the Canadian and British Insurance Companies Act (Canada) or the Foreign Insurance Companies Act (Canada) or is specially authorized thereunder, it shall not do or carry on any part of the business of insurance in the Province.

Other provinces have set up their own licensing requirements which involve investment controls and reporting requirements, but have exempted insurers registered under one of the federal statutes. In some cases the exemption for federally incorporated or registered companies is expressly provided in the provincial insurance acts,[54] while in some provinces the exemption is a matter of administrative practice. For example, in Ontario, while the Superintendent's office annually examines all Ontario incorporated companies and incorporated fraternal societies,[55] it relies on the federal department to examine federally registered companies. As Mr. Thompson explained the current practice to the Ontario Select Committee:

> Although the Office of the Superintendent relies on the Federal Department of Insurance for insuring the solvency of the federal companies, it is understood that this Office is responsible to the Ontario policyholders in making sure that the promised insurance benefits would be paid to them when they are due. If the Office is in any doubt as to the capacity of a federal company to meet its obligation to Ontario policyholders, we shall certainly initiate actions, either on our own or in conjunction with federal and/or other provincial authorities.[56]

These formal exemptions and working arrangements also exist between provinces. As a result, the majority of insurers doing most of the insurance business within the provinces are in practice subject to the solvency requirements and supervision of the federal department. Few provincially incorporated insurers do business in more than one province, but those that do are subject in practice only to the supervision of the Superintendent in the province of incorporation.[57]

In view of the history of litigation involving the issue of constitutional competence over insurance this delegation to the federal department may seem remarkable. Federal attempts to regulate for the financial well being of the industry were continually attacked in the courts. Yet the form and extent of this federal regulation was not in general different from that now in fact applied to most insurers. Why the present practice has developed in view of this history is not easy to explain. No doubt in part the cases illustrate that the tactical advantage of particular litigants may not have coincided with the strategic interests of governments or the industry. However, this cannot be the major explanation, since many of the leading cases were decided on reference. In some cases, provincial opposition may have been prompted by the fact that the proposed federal schemes involved attempts to regulate the insurance contract as well as to promote solvency. Perhaps some provinces were concerned about being excluded entirely from imposing different standards in the future without any fixed view that the proposed federal schemes were inappropriate. However, the most likely explanation is that the present practice reflects a change of outlook by both the provinces and industry after the constitutional position had become established. The industry in particular may have come to realize that supervision to promote solvency was inevitable, in which case it was better if this were done at the federal level.

The attitude of the provinces may be explained by the nature of this type of regulation. First, the cost of duplicating federal enforcement would be significant for most provinces. Second, there are no significant regional differences in the industry based on history, geography, or local economic conditions. Third, no significant differences in political philosophy have developed. Fourth, there are no obvious local advantages, in terms of revenues, patronage, or political credit, from provincial enforcement. Fifth, except in the largest provinces, there may not have been enough local expertise for the provinces to do the job.

The Association of Superintendents of Insurance

In May of 1914, provincial representatives (Superintendents or, in the case of Alberta, the Deputy Superintendent) of the four western provinces met in Calgary to discuss ways and means to secure uniformity in the laws relating to contracts of insurance. A second meeting was held the following year in Regina at which the Ontario Superintendent was also present. In 1917 the four western provinces and Ontario organized "The Association of Provincial Superintendents of Insurance of the Dominion of Canada". Quebec entered the association in 1921, while New Brunswick (1932), Nova Scotia (1932), P.E.I. (1933), Newfoundland (1952), N.W.T. (1972) and the Yukon Territory (1978) joined at later dates.[58]

The association has met at least annually since its founding, rotating the site of its meetings amongst the provinces. The association has no permanent staff of its own, is not created or recognized by provincial legislation and its meetings are financed by host provinces and (in recent years) by the registration fees of industry representatives attending the association's public sessions.

The association has taken on the function of the Uniform Law Conference in relation to insurance matters.[59] In addition to drafting uniform legislation, the association also provides a mechanism for the Superintendents to discuss common regulatory issues, exchange data, and establish other means of cooperation.[60] In recent years the association has also drafted standard guidelines to govern the conduct of the industry in certain areas. These guidelines have sometimes been adopted as formal regulations in some provinces,[61] but for the most part the Superintendents expect them to be followed by the industry without further adoption by local provincial legislators.

The association now meets twice a year, once in the spring in executive session and once in the fall when it invites submissions from the industry. The fall meeting is referred to as the annual conference and until very recently has usually lasted four or five days. The first two or three days are devoted to hearing submissions from the industry on proposed changes to the uniform legislation, Superintendents' guidelines, or other matters of common concern where the Superintendents try to coordinate their actions. Following these open meetings, the Superintendents move into closed session where they determine what, if any, course of action to adopt. Since the 1950s several hundred insurance industry representatives and a handful of risk managers have attended the annual conferences. The insurance industry representatives are the officers of various industry organizations and senior officers of insurance companies.

During the open meetings of the annual conference, the Superintendents invite comment on the reports of the association's six (soon to be seven) standing committees. The standing committees are made up of the Superintendents of four or five provinces. During the course of the

year between the annual meetings they prepare reports which describe the disposition of previous recommendations and suggest new matters for consideration. Where major changes are proposed, the standing committees assign the initial task of studying the issues and drafting legislation or guidelines to advisory committees made up of representatives from the industry and the Superintendents' offices.

The open sessions of the annual conference are no longer working sessions in the sense of involving any active dialogue between the Superintendents and the industry or any actual drafting of legislation or guidelines. Instead, a few representatives of the various industry organizations — primarily the Insurance Bureau of Canada (IBC) and the Canadian Life and Health Insurance Association, Inc. (CLHIA) — usually read from carefully prepared written submissions. While there is an occasional comment from other conference registrants, the vast majority of the 200 to 300 in attendance only listen and observe.

In effect the annual conference has come to serve two distinct functions. These functions are not entirely compatible, and as a result neither function is served as well as it could be. As a body of uniformity commissioners, the Association of Superintendents has been most successful in dealing with specific legal or administrative issues where the general thrust of the law and broader principles have been established elsewhere. What it has on its agenda are more narrow issues that require detailed examination and expert advice. Yet at the same time the annual conference has become an annual convention for the industry. It serves as an occasion for senior officers of the companies to meet and exchange information and discuss common concerns. No doubt most of the more useful exchanges occur in more informal settings apart from the open formal sessions with the Superintendents. Nevertheless, because of the very large audience of senior industry officials at the formal sessions, they do not seem to be the right occasion to examine specific issues in detail or at length. There is a tendency for the participants to speak in more general terms or, recognizing that the real work of the association is done elsewhere, to limit their comments to a constant reiteration about the process (that the industry expects to be consulted, is willing to cooperate, hopes there will be adequate notice, etc.).

Moreover, the annual conference has taken on a misleading appearance. The procedures and trappings adopted at the formal sessions suggest a more deliberative and authoritative enquiry than is actually the case. The trappings include a raised platform, special identification and provincial flags for the Superintendents, instantaneous translation and a published transcript of the proceedings. The procedures include written submissions, designated spokesmen for industry groups, apparently impartial Superintendents who ask occasional clarifying questions but seldom engage in dialogue and are never argumentative, and withdrawal by the Superintendents to render a decision. All of these trappings and

procedures have been adopted as a matter of convenience or have evolved without any conscious desire to mislead. But they do give the proceedings of the annual conference the appearance of an independent or semi-independent administrative tribunal with statutory rule-making authority over the industry. Yet few of the Superintendents come to the conference with plenipotentiary authority and little can be adopted without reference to the provincial governments.

The association is a unique institution of interprovincial cooperation. There are no similar associations for any other provincially regulated industry. In fact, representatives from few provincial government ministries meet as often and none has such a long history of continuous cooperation. The apparent success of the association has led both the Uniform Law Conference and the provincial law reform commissions to defer to the association in the reform and promotion of uniformity of provincial insurance law.

As we have seen, the association has no permanent staff. A few employees of provincial insurance departments are co-opted from time to time to work on specific tasks, and the association also relies very heavily on the industry. This reliance extends beyond the usual requirement that a regulated industry needs to cooperate with the regulators. The association must rely on the industry to supply information and trained personnel in the drafting of guidelines, regulations and legislation. For instance, until recently no provincial department had any legally trained employees and even now only a few departments have employees with such training.

At the same time, the insurance industry is well organized to supply the initiative and expertise needed by the association. The insurance industry in Canada is characterized by relative ease of entry, a large number of insurers and a relative lack of concentration. For various reasons it has historically been divided between the property and casualty industry on the one hand, and life and health (or personal lines) industry on the other. The property and casualty industry is approximately 60 percent foreign owned (with these foreign-owned companies writing approximately 70 percent of the total direct premiums in Ontario). In the life and health industry the situation is reversed. While Canadians owned only 34 percent of the active companies in 1978, these companies generated 68 percent of 1978 premiums, controlled 70 percent of invested assets and carried 68 percent of the life insurance in force in Canada at the end of 1978. In Ontario, there were 260 companies or other organizations marketing property and casualty insurance in 1979, and 129 marketing life and health insurance.[62]

In the property and casualty industry there are a significant number of specialty markets where a small number of companies have most of the business. However, for most standard risks (automobile, property and general liability), which account for about 90 percent of the market, no

one company has more than 10 percent of the market, and the five largest groups of related companies account for a 25 percent share.

In the life industry the largest company has less than 10 percent of the business while the 15 most active life insurance companies have about 70 percent of the total business.

The relative lack of concentration or dominance by a few companies in the insurance industry has not, however, prevented the industry from acting cooperatively. In some areas the Superintendents have encouraged collective action in the public interest. For example, they have long had an interest in the adequacy of premiums to cover future contingencies. This has led to the creation of rating bureaus to collect and analyze statistics and to suggest suitable premiums.[63] In other areas, the industry has sought to standardize policy forms to facilitate the collection of meaningful actuarial and statistical data, to simplify the marketing and servicing of contracts and to respond to requests from the Superintendents.

In other words, apart from the desire to influence government regulation, a number of factors have led to concerted action by the industry. The result has been several national organizations representing different parts of the industry, some with very large permanent staffs. These national organizations, especially the Insurance Bureau of Canada (IBC) and the Canadian Life and Health Insurance Association (CLHIA), help explain why the annual conference has been effective. They supply the information, expertise and manpower to draft uniform legislation, regulations and guidelines. Within the association itself evidence indicates that more often than not the initiative for change comes from these industry groups.

There are several other aspects of the annual conference which should be described in order to understand the association's role in promoting uniform insurance legislation. First, it operates with very little publicity. Apart from local reports of the impact of the meeting on the local hospitality industry, the substance of the meetings is covered by at most one or two newspapers. The association has managed to keep a lower profile than even the Uniform Law Conference. Second, the subject is thought to be a highly specialized one which should be left to the experts. This may also explain the media's perception of its newsworthiness.[64] Participation is not invited from groups other than those in the industry. Third, unlike the Uniform Law Conference, no other government department is involved in the annual conference. In particular, the industry's concerns and the Superintendents' decisions are not filtered through the provincial justice ministries. Fourth, there are few independent legal experts outside of the industry in the provinces, i.e., there are few local experts to conduct additional studies and recommend local variations.

There is no doubt that, under the auspices of the association, provin-

cial insurance legislation, especially amongst the common law provinces, has been remarkably uniform for more than 50 years. However, it would be a mistake to attribute this success solely to the association. On several occasions other groups have had a significant impact on the development of uniformity. Moreover, given the nature of the association, it is not surprising that it has been most successful at reacting to minor variations once a consensus on general issues has developed. The association itself has not often been the initiator of major changes and has had little success in promoting uniformity in those areas where the provinces have recently adopted innovative schemes or regulations such as no-fault benefits in automobile insurance, mass merchandizing, self-regulation of insurance intermediaries and anti-twisting rules in life insurance.

At several points in the history of provincial insurance regulations, consensus has been reached through federal and provincial (mostly Ontario) royal commissions.[65] In addition to the Ontario royal commission of 1875,[66] which established the pattern of much provincial regulation over the insurance contract, there was the Ontario royal commission of 1917[67] to enquire into the fire insurance business and the Ontario royal commission of 1929[68] to enquire into and investigate automobile insurance premium rates. Both commissions had a significant impact on provincial insurance legislation. The 1917 commissioner, The Honourable Mr. J.A. Masten, reported that rate-fixing associations of underwriters were desirable in the public interest under government supervision and control. This led to the present system of government-sanctioned intercompany cooperation in rate setting through such organizations as the Insurers' Advisory Organization. The 1929 commissioner, The Honourable Mr. Justice Hodgins recommended legislation modelled on the American Automobile Association (AAA) Safety Responsibility Law. This led to the financial responsibility laws which were adopted by all of the provinces.

In the area of life insurance, following the report of the Armstrong committee in New York State (1906),[69] a royal commission on life insurance was appointed in 1907 with Judge Duncan MacTavish as the commissioner.[70] Following World War I, the first Uniform Life Insurance Act was prepared by the Commissioners on Uniformity of Legislation in Canada.[71] A draft act was prepared by a drafting committee chaired by John D. Falconbridge, Q.C., of Osgoode Hall Law School. This draft act was jointly considered by the uniformity commissioners, the association, the Canadian Life Insurance Officers Association and representatives of the Friendly Societies in 1921 and 1922, and finally adopted in 1923. It was put into effect in all the common law provinces shortly thereafter. In addition to these Canadian efforts, the association was also greatly influenced by the systematic revision of the insurance law of the State of New York.[72]

The pattern of significant reforms being initiated from outside the association has continued in recent years with several provincial commissions of enquiry (studying automobile insurance and insurance intermediaries) leading to substantial changes in the legislation of some provinces. The most thorough study of Canadian insurance regulation in recent years was that undertaken by the Ontario Select Committee on Company Law which issued five reports between 1977 and 1981.[73] It is too early to determine whether these reports will have much effect on provincial insurance legislation or on the work of the association. While most parts of the uniform act are currently under review by the association, the initial drafts do not indicate that the association intends to adopt many of the Select Committee's recommendations.[74]

There have been times during the association's history when the quality of the uniform legislation it proposed was not high. Typographical errors, complex and obscure provisions and ambiguity abound in the legislation proposed during the 1960s and 1970s. This was also a time in which provincial insurance acts were frequently amended in response to recommendations from the association. As a result, the majority of amendments made each year to various provincial insurance acts during this period were not substantive, but were designed to correct misprints, drafting errors or oversights.

Insurance Industry Organizations

Regulation of Pricing and Forms

In many countries the insurance industry has been exempt from anti-combines legislation.[75] The explanation for this special status lies in the view that uncontrolled price competition in the short term is not in the public's long-term interest. Too vigorous price competition in the short term results in insurers collecting less in premiums than is necessary to meet their future liabilities. Hence it is in the public interest to encourage insurers to cooperate to establish adequate premiums. As we have seen, this was one of the main recommendations of the Ontario royal commission[76] appointed in 1917 to enquire into the fire insurance business. As a result, provincial insurance statutes expressly authorize the creation of rating bureaus[77] and authorize the Superintendents to monitor the rates or charges fixed by insurers.

In the property and casualty field, bureaus (or as they were known, boards or conferences) were originally organized along provincial or regional lines for the purpose of designing forms, settling rules, regulations and rates, and inspecting risks.[78] However, in the late 1950s the Canadian Underwriters' Association (CUA) was reorganized and took in as branches most of the previously autonomous fire insurance underwriters' boards. At the same time, the non-tariff insurers who had

formed a number of independent conferences, founded a new national organization known as the Independent Insurance Conference (IIC). Finally, in July 1974 the CUA and the IIC joined forces to form the Insurers' Advisory Organization of Canada (the IAO), which is now the principal rating bureau in Canada.

In the life and health fields, the Canadian Institute of Actuaries conducts industry-wide analyses of mortality data. The Canadian Life and Health Insurance Association (CLHIA) encourages its members to contribute their experience to these professional studies. In addition, the industry relies on the information collected by two American organizations, The Society of Actuaries and the Association of Life Insurance Medical Directors.[79]

In addition to authorizing the creation of rating bureaus, provincial legislation also authorizes the Superintendents to appoint a statistics-gathering agency.[80] Most provincial Superintendents have designated for this purpose the Statistical Division of the Insurance Bureau of Canada (IBC), an organization sponsored by the vast majority of property and casualty insurers. The rating bureaus only advise their member companies about recommended premium rates and individual insurers are not compelled to follow this advice. Of course, many insurers do follow the advice of rating bureaus.

The 1917 royal commission[81] recommended that industry rate fixing be done under government supervision and control. This reflected a concern which had been significant in the United States but less so in Canada. The nature of this concern was that if the government encouraged minimum or adequate rate setting by discouraging price competition, the government would need to ensure that the rates set were reasonable and non-discriminatory. The solution adopted in many U.S. states was modelled on railway rate regulation and involved obtaining approval for rates from an administrative officer or board. In Canada, however, such active supervision of rates is uncommon. In Ontario, the sections of the act giving the Superintendent authority to disallow unfairly discriminatory rates have not been proclaimed. The extent of rate monitoring in Ontario was described in a short note by the Superintendent to the Select Committee and the committee concluded that "clearly, monitoring activity in Ontario is at an early stage of development."[82] Given what has happened elsewhere, in particular in the United States, the absence of any significant rate monitoring by the provinces has avoided a potentially serious impediment to the harmonization of provincial laws.

In addition to fixing or promulgating rates of premium, rating bureaus are also expressly authorized by statute to fix or promulgate the terms or conditions of insurance contracts. In the property and casualty field many standard forms have been promulgated under the auspices of the IBC.[83] As a result, except in the area of liability insurance and some

other specialized lines of insurance, the basic policies and the numerous options (riders or endorsements) are standardized across the industry. The situation in the life and health fields is more confused. In particular, the number of options, endorsements and riders used in connection with life insurance policies is very large[84] and no common terminology or common forms are used.

Other Forms of Industry Cooperation

Even without government sanction of rating bureaus and other industry organizations to collect statistics and promulgate rates and forms, insurers would, no doubt, have formed associations to promote their common interests. However, the general attitude created by these government-sanctioned activities may have encouraged these industry organizations to engage in concerted practices which in other industries might be considered anti-competitive practices inimical to a healthy market economy. The three major industry organizations in Canada are now the IBC (property and casualty insurers), the CLHIA (life, sickness and accident insurers) and the Board of Marine Underwriters.

The IBC was formed in 1964 and some of its objectives are:

- to provide a forum for discussion of general insurance;
- to collect, collate and analyze actuarial and statistical information;
- to study legislation and legislative proposals;
- to engage in research and pilot programs and projects with a view to providing a high level of service to the public; and
- to engage in activities to promote a better public understanding of the insurance business.[85]

Approximately 100 companies and groups belong to the IBC and they provide more than 90 percent of the property and casualty insurance written by private companies in Canada.[86] Besides promulgating standardized forms, IBC has fostered agreements on such matters as claims, subrogation and overlapping cover.[87]

CLHIA was formed in 1981 by the merger of the Canadian Life Insurance Association and the Canadian Association of Accident and Sickness Insurers. CLHIA represents 122 member life and health insurance companies carrying on business in Canada.[88]

There are several other industry organizations which are active in the life and health insurance field. These[89] include:

- The Life Underwriters Association of Canada (LUAC). LUAC is the professional association for licensed life insurance agents. It acts as a training and educational body and maintains and administers a code of professional ethics.

- The Life Insurance Managers Association of Canada (LIMAC). LIMAC is an association of insurance branch managers who are active in building career sales organizations.
- The Canadian Institute of Actuaries (CIA). CIA is the professional body of actuaries in Canada. Its objectives are to advance and develop the actuarial science, promote its application and to maintain a standard of conduct among its members.
- The Life Insurance Institute of Canada (LIIC). LIIC assists the Life Office Management Association in administering its programs in Canada. LOMA is an educational association based in the United States whose objective is to improve the management of life insurance companies through an exchange of experience and research.
- Canadian Home Office Life Underwriters Association (CHOLUA). CHOLUA provides a forum for discussing problems relating to home office underwriting.
- Canadian Life Insurance Medical Officers Association (CLIMOA). Members are physicians employed in the insurance industry. CLIMOA provides a liaison between the medical profession and the insurance industry.

In addition, the following organizations[90] are active in the property and casualty field.

- Association of Independent Insurers. An organization which furnishes its members with statistical information on which they can assess insurance risks and determine premium rates, as well as other insurance contract terms and conditions.
- Canadian Association of Insurance Women. An association of women employed in the general and life insurance business who participate in, and contribute to, the enhancement of education and fellowship.
- Canadian Association of Mutual Insurance Companies. An association of 48 farm and cash mutuals, representing all the provinces in Canada, which operates to promote Canadian insurance.
- Canadian Boiler and Machinery Underwriters' Association. A non-profit organization of insurers writing boiler and machinery insurance in Canada which promotes a high ethical standard in the conduct of business, and makes available to members on an advisory basis information on rating, policy forms and wordings. Promotes public safety in connection with the use of boilers and machinery objects by exchanging data regarding causes of accidents.
- Canadian Federation of Insurance Agents & Brokers Associations. A non-profit federation of associations of independent insurance agents and/or brokers. Through its committees and communications, it plays a leading role in government and industry liaison and development for the benefit of independent producers and their public. To further its

mandate to deliver educational opportunities to independent agents and brokers, the federation coordinates and assists in the professional development and education programmes of its member associations and through them, is authorized by the Superintendents to administer examinations for the licensing of agents.

- Canadian Federation of Insurance Claimsmen. An organization of provincial claims associations and full-time claimspeople from company, staff, independent and non-insurance fields. Holds a conference every two years devoted to insurance claims education, social activities and communication in the industry.
- Canadian Independent Adjusters' Conference. A professional organization founded to raise the status of adjusters, ensure that adjusters are competent to perform the services they undertake, establish standards of conduct, and improve members' knowledge and adjusting methods.
- Canadian Insurance Accountants Association. An organization which promotes the study, research and development of modern theory, practice and procedures as applied to insurance accounting and statistics, and which acts as a representative body of the industry.
- Canadian Insurance Claims Managers' Association. An organization of claims managers which promotes high standards of ethics in the handling of claims.
- Insurance Institute of Canada. The professional educational arm for the property and casualty insurance industry which offers courses through correspondence, community colleges and universities across Canada.

Many of these national organizations have provincial branches or affiliates as well.

On first impression, the sheer number of these associations might suggest an industry divided into numerous groups having disparate interests. In fact, however, the IBC and the CLHIA act as effective umbrella organizations which have helped to standardize insurance forms and practices across the country.

Self-Regulation

As explained elsewhere, Ontario has acted on various recommendations and transferred the Superintendent's supervisory and licensing role over insurance agents and brokers in the property and casualty field to the Registered Insurance Brokers Organization (RIBO).[91] It may be too early to tell whether in practice this has led to more or less public control over the conduct and training of intermediaries. However, it has not prevented the Association of Superintendents from acting as a forum for promoting unification of qualification and procedures.[92] Whether the

addition of a new provincial regulatory body separate from the Superintendent's office will make the association less successful in promoting uniformity remains to be seen.

The establishment of RIBO may be the start of a trend which will affect the process of harmonization of provincial laws. In Ontario the CLHIA has responded to the Select Committee's concerns by developing a proposal that agent training, conduct and licensing be industry self-regulated under a new and separate organization, the "Life Insurance Licensing Board."[93] In addition, the CLHIA created a committee on self-regulation in 1981 in response to a request from the Ontario minister of consumer and corporate affairs that the life insurance industry develop plans to provide self-regulation within the industry.[94]

Harmonization through Traditional Conflict of Laws

Since John Falconbridge was the chairman of the drafting committee for the first uniform life insurance part of the Insurance Act, it is not surprising that it contained a choice of law rule to determine the circumstances when local life insurance legislation applied.[95] This rule was more precise (and gave local law a wider application) than the traditional common law rule. Of course, the adoption of the uniform life insurance part meant that this choice of law rule was unnecessary to harmonize provincial law. However, it did serve to prevent foreign insurers from choosing a foreign law to govern life insurance contracts sold to Canadian residents. This rule was unilateral in the sense that it only specified when local law applied. The rule did not specify which foreign law would apply, or in what circumstances.

The constitutional validity of this section of the uniform life insurance part was doubted by some of the judges in *Gray v. Kerslake*.[96] This decision was fresh in the minds of the drafters of the revision of the life insurance part when they reported to the annual conference of the Superintendents later in the year.[97] As a result, the revised life insurance part now provides that it applies to all contracts made in the province.[98] By the time the sections regulating group life insurance were added to the statute these concerns were overlooked and the life insurance part applied if the group life insured was resident in the province at the time he became insured.[99] Similar provisions were also added for both group and individual policies when the sickness and accident insurance part was revised.[100]

The revision of the life insurance part also contained a jurisdiction provision which allowed an action to be brought in the province by a local resident if the insurer was authorized to transact insurance there at the time the contract was made.[101] In spite of the views of some of the judges in *Gray v. Kerslake*, most of the provinces have choice of law rules in the general part of their insurance acts which extend the application of

local law by "deeming" contracts to be made within the province under certain circumstances.[102] There are minor variations in the wording in the legislation of some provinces but all of the statutory rules are unilateral in nature.

So far the Canadian courts have ignored the statutory rules in deciding the general question of what law governs an insurance contract.[103] That is, they have not reasoned by analogy from the statutory rules to give foreign insurance law a similar wide application based on the presence in a foreign jurisdiction of any factor (contacts) mentioned in the statute. This results in two pertinent choice of law rules governing insurance contracts and suggests that if significant differences in provincial insurance legislation did develop, these rules would be inadequate to produce harmony. In the same way, the existing jurisdiction sections in the life insurance part are not matched with parallel recognition sections. Hence harmony would not necessarily result from the universal recognition and enforcement of judgments either.

Even without the difficulties introduced by these statutory jurisdiction and choice of law rules, it is not likely that the common law rules of the conflict of laws would be a very satisfactory basis for the harmonization of provincial insurance laws if significant differences in provincial law did develop. The choice of law rule covering contracts developed by the common law has collapsed into a directionless restatement of the issue, too imprecise and involving too much juridical risk to be the basis of sound underwriting decisions. Of course such uncertainty could be avoided if insurers were allowed to specify a governing law in their policies. But given the remedial or protective thrust of much provincial insurance legislation covering the contract, it is difficult to imagine any provincial government in effect making compliance voluntary by allowing insurers to choose a more favourable foreign law.

Harmonization through Integrative Drafting and Interpretation

The one area where some diversity in provincial legislation has developed is in the system of compensating automobile accident victims. In particular there are variations in the nature and scope of limited accident benefits (no-fault benefits). In addition, issues have developed concerning how these benefits should be integrated with other forms of compensation in the case of interprovincial accidents.

These problems have not been tackled using traditional choice of law rules. In the case of the older third-party liability system in which car owners and drivers are insured against their liability for wrongfully causing injury to others, some differences are resolved in two ways: first, by provided coverage against liability imposed by any law in Canada and the United States[104]; and second, by having insurers undertake not to

raise defences or limits on liability except those available at the place of accident. This is done both by legislative mandate[105] and a system of undertakings which each automobile insurer is required to file in order to obtain a local licence. Instead of one law governing the insurance contract, in effect the insurer undertakes that the contract will vary according to the circumstances and will at least contain the minimum requirements provided by the law at the place of accident.

These rules do not go to the question of what tort law will determine the wrongdoer's liability, but they do go beyond just determining the contractual rights of the insured wrongdoer against his insurer. They also establish the scope of the victim's direct recourse against the liability insurer once liability has been established.[106]

In other contexts, the selection of the law of the place of accident to govern the tort rights of the parties is in disrepute because the place of accident is fortuitous and the application of its law may catch the victim by surprise.[107] However, in the case of automobile accidents the present system is well entrenched and while it does not completely resolve the question of what law will govern the victim's rights, it does settle the question of what rights he has against the wrongdoer's insurer once liability has been established. When first-party accident insurance was combined with third-party liability insurance, some interprovincial choice of law problems were ignored. However, the general intention was to use the system of undertakings filed by insurers to provide victims with the minimum benefits provided at the place of accident. When the courts[108] found the existing undertakings inadequate for this purpose, the Association of Superintendents agreed to their amendment.[109]

In relation to the issue of integrating no-fault benefits with other sources of funds in interprovincial cases, the courts have been left with little legislative guidance. They have generally tried to find a solution by interpreting the relevant statutes in such a way as to make them compatible rather than by selecting a "governing" law. In doing this they have had mixed success.[110]

Harmonization through Interprovincial Agreement

The no-fault scheme adopted in Quebec presented a special case for non-residents injured in that province. Non-residents did not qualify for local benefits yet their right to tort recovery was reduced. To meet this particular problem the provinces of Ontario and Quebec entered into an agreement (Memorandum of Agreement between Régie de l'assurance automobile du Québec and Minister of Consumer and Commercial Relations for Ontario) on December 27, 1978.[111] The agreement was implemented in each province by local legislation.[112] There are similar agreements between Quebec and other common law provinces.

The American Experience

It would be a mistake to assume that there is something about the business of insurance that makes uniformity a necessity.[113] Uniformity is desirable, but its absence would not be fatal. The American experience illustrates that the industry can prosper even with a significant diversity in state regulation. The history of American regulation also illustrates that there are no compelling factors to cause the industry to favour national regulation. Shortly after the time when the Canadian industry agreed to federal regulation, the American industry was urging Congress to renounce its newly acquired power[114] over insurance and return it to the states. Congress responded by enacting the McCarran-Ferguson Act[115] in 1945. In this case the industry's primary concern was to avoid the application of the Sherman Act, which would have made cooperation on rating and standard forms illegal. In addition, it has been suggested that the industry had learned how to "work with" state legislatures and insurance departments and that "experience with state control had led insurance men to appreciate the possibility of retreat from a jurisdiction in which the situation became too bad."[116]

Whatever other factors may have been present, there is no doubt that the potential application of the Sherman Act had a significant impact on the industry's attitude toward where jurisdictions over insurance properly lay. As Professor Spencer L. Kimball describes the impact of the *Southeastern Underwriters* case,[117] which held that insurance was commerce and subject to the Sherman Act:

> This decision had revolutionary implications, and produced consternation in industry people, who were no longer willing, as they had been a few decades earlier, to see the insurance business subject to federal control.[118]

This concern may have distorted the industry's historical preference for national regulation. In any event, it illustrates that the nature of regulation is often far more important than the need for harmonization of state or provincial laws.

The American experience also illustrates that much more diversity than is found in Canada can be tolerated without serious damage to the industry. As long as local reporting, investment and valuation of assets rules do not actually conflict, the industry can cope with variations in severity. In addition, the impact of local modifications of insurance contract law can be assessed and provided for in the underwriting process. This can probably be done with a tolerable degree of fairness whether or not very predictable choice of law rules are adopted.

Factors which have Fostered Harmonization

As we have seen, the harmonization of Canadian insurance law was accomplished by the 1930s in two major ways: by delegation to the federal department of insurance and by uniformity of provincial legislation.

Of the two major ways that harmonization has occurred, the more important is through the delegation to the federal department of the primary responsibility for the financial soundness of the industry. This has happened in spite of constitutional interpretation by the courts. There were significant economic incentives for this, particularly among the smaller provinces which lacked the resources to develop and enforce their own reporting and investment rules. Even among the larger provinces there were obvious economic advantages in not duplicating enforcement efforts. Since this type of regulation is far more burdensome than any other legislation affecting the industry, there were significant economic incentives for the industry to cooperate with the federal government and the smaller provinces in devising a system which would withstand constitutional challenge and yet avoid multiple compliance requirements. This system was not developed quickly. It was only finally established after several decades of constitutional litigation had made clear that a national system could not be adopted by mandatory federal legislation and more than 60 years after this type of government regulation was first adopted in Canada.

Harmonization of Canadian insurance law did not occur during a period of legal reform but followed a lengthy period in which a common philosophy and general approach in both federal and provincial legislation had developed. So far the harmonization has continued, being threatened only in those areas where widespread public concern has developed about the shortcomings of the existing law. These areas have not been numerous. The one significant example is the system of compensation for the victims of automobile accidents. In other words, the history of insurance law suggests that the timing of harmonization efforts is of critical importance. There must be a coincidence of a relatively well developed system of law or regulation whose main ingredients are no longer controversial and a general political mood that regards cooperation as essential to promoting economic growth.

Another major factor which has fostered harmonization is a highly organized industry whose national organizations have sufficient resources and expertise to devote a considerable amount of time and energy to unifying the law. As we have seen, registration fees from industry representatives largely finance the annual conference of the Association of Superintendents and industry personnel do much of the work of the association's advisory committees. At the same time, there is a long-standing cooperation between industry organizations and government regulators. As in other specialized fields, bureaucrats with sufficient expertise have tended to come from the industry and have been familiar with and sympathetic to its basic goals and needs. The common industry and government goal of promoting adequate rates through the cooperative exchange of underwriting data and the promotion of common forms has provided a basis for other types of cooperation.

The national insurance organizations have devoted a considerable

amount of energy and resources to helping the Superintendents to harmonize provincial law because private law is more important to them than it is in some other industries. The major product that the industry markets is a legal contract and there is necessarily a close correlation between the insured's legal rights and industry practices. The situation in the insurance industry can be contrasted with that in the manufacturing of durable goods, or retail trade, where private law (largely because it is permissive) has only a marginal impact on industry practices. Other industries can tolerate diversity in provincial laws by adopting permissible national practices. However, the same technique is not as readily available to the insurance industry. The content of private insurance law is thought to have direct impact on the exposure or potential liability of insurers. Of course local conditions can and are considered when premiums are set. However, given the number of other variables that must be taken into account in making sound underwriting decisions, the importance the industry attaches to uniformity is understandable.

Harmonization of insurance law has also been easier because no significant regional differences affect the industry. The country is not divided between "producing" and "consuming" provinces. Nor are there significant geographical, cultural or historical differences which affect the industry. While the Canadian insurance industry is primarily based in Ontario and Quebec this has not led these provinces to adopt laws more protective of the industry. On the contrary, Ontario has consistently led the way among the common law provinces in modifying the common law to provide greater protection for the insured. However, concern that the regulation of the industry would be dominated by Ontario and Quebec was one of the reasons why the other provinces favoured federal regulation to promote the financial integrity of insurers. Significantly, control over the investment decisions of insurers has not been a source of tension between the provinces. In part this may be because the impact of these decisions on the local economy was not widely appreciated. This is hard to understand in view of provincial concern about the conduct of banks and trust companies and the historical precedent of early federal legislation designed to force foreign life insurers to invest their funds locally. However, the early federal legislation was primarily designed for the protection of local policy holders rather than as a means of ensuring sufficient local capital development. It is only in the last few decades and largely in the United States that the social consequences of the insurance industry's investment decisions have become a matter of public concern.[119]

The harmonization of provincial insurance law is not as unique or remarkable as it seems to contemporary observers if it is measured against the prevalent standards of the 1930s and 1940s. Harmonization was achieved at a time of greater interprovincial emphasis on uniform private law. What has happened since then is that many areas of con-

sumer and commercial law have received considerable attention by local reform-minded bodies (legislative committees, commissions of enquiry and law reform commissions). These bodies have had the services of local experts, have occasionally responded to local concerns and have largely duplicated each other's efforts. Often uniform legislation has not been attempted until after local reform legislation has been passed or at least approved for adoption by local authorities. The dynamics of this situation are that each provincial representative in any interprovincial forum starts with a fully developed local proposal and an attitude that the local refinements are a vast improvement over the work of others. Indeed the provincial representatives are often the local experts whose original and unique contributions are largely to be found in these local refinements. In contrast, insurance law (apart from the special case of automobile insurance where, indeed, uniformity has broken down) was not the subject of many local studies during the 1960s and 1970s.

Subject to a few isolated exceptions, provincial law-reform bodies have left the field to the Association of Superintendents. For their part, the Superintendents have seldom initiated legislative changes except through the association. At the same time, industry initiatives have come largely from the national offices of such organizations as the Insurance Bureau of Canada, Canadian Life and Health Insurance Association and the Canadian Federation of Insurance Agents and Brokers Associations.[120]

The fact that major responsibility for promoting uniformity in provincial insurance law has been left to the Superintendents has tended to insulate their work from other provincial concerns. The annual conference is entirely devoted to insurance matters, and insurance legislation does not have to compete with other matters for the attention of the uniformity commissioners. At the same time, the technical nature of the subject and the lack of publicity and public debate surrounding the work of the annual conference has facilitated the speedy adoption by provincial legislatures of the association's proposals.

Some of the factors which have fostered uniformity in provincial insurance law have also created disadvantages. The relative independence of the association, its insulation from the local political process, and the technical nature of its concerns have made it a very successful vehicle for nurturing harmony. However, it is not an appropriate institution for innovation or experimentation. The association has no centralized staff, and it works with national industry groups whose best interests are not served by changes in the law, especially if this leads to local variations. Since provincial Superintendents are also uniformity commissioners and discuss changes in legislation and guidelines primarily in that context, there is less tendency for them to act independently than if the two functions (local regulator and uniformity commissioners) were performed by separate individuals.

The insulated context in which changes in the law are discussed has prevented insurance law from developing along the same lines as general contract doctrine. For example, not only has insurance been exempted from much modern trade practice legislation, but the process of "doctrinal disintegration" which developed in the case law after Lord Mansfield's time has not been reversed. As a result, more onerous obligations are imposed on insureds and they are subjected to harsher penalties and forfeitures than any other contract maker.[121]

Since legislative change is centralized in the association there are no local forums for non-industry groups to voice concerns about proposed legislation. The association itself has operated with virtually no input from anyone outside the industry. On occasion, as with the revision of the life insurance part, it has received comment from such outside groups as the Canadian Bar Association but these have been isolated occasions rather than the usual pattern. While the association rotates the site of its annual conference, this has not enabled the Superintendents to hear from a wider variety of people. In effect they have just met with the same industry representatives at different locations. The cost of attending, the format of the meetings, and the lack of notice all tend to discourage individual presentations. While the association has received some representations from the Consumers' Association of Canada, recognition of that group's entitlement to standing at the annual conference has come slowly and still does not extend to active participation in the advisory committees.

Not only has there been little direct public participation in the work of the association, there have been no provincial forums in which the work of the association can be publicly examined. In theory this could occur during the provincial legislative process, at least in the case of proposed legislation. However this is at the end rather than the beginning of the process. Moreover, the debate is often not well informed since the responsible ministers are not experts and have not been involved in the process.

No doubt the cautious, limited and technical nature of the proposed changes go hand in hand with a seeming lack of political and public accountability. Bolder proposals with more obvious impact on the community would arouse greater public interest. The point is, however, that the association is widely regarded by other branches of government as having primary responsibility for the insurance industry and this tends to discourage others from taking the initiative. At the same time, the association's apparent success has been possible because of the cautious and conservative way in which it exercises its mandate.

Notes

This study was completed in November, 1984.

1. Legislation to regulate the formation and affairs of mutual fire insurance companies was first passed in Upper Canada in 1836 (6 Will 4, c. 18). This legislation was amended and continued for both Upper and Lower Canada by the Province of Canada on several occasions. More general legislation to regulate fire insurance companies was passed in Ontario in 1860 (23 Vict. c. 33) and in New Brunswick in 1856 (19 Vict. c. 45).
2. See Brown and Menezes, *Insurance Law in Canada* (1982), p. 23.
3. The Report of the Royal Commission on Dominion Provincial Relations (1940), Book II, p. 59.
4. Neufeld, *The Financial System of Canada, Its Growth and Development* (1972), pp. 215–20.
5. MacGillivray, *Insurance Law* (7th ed. 1981) p. 932.
6. See G. Tumewine-Mukubwa, "A History of Regulation of Life Insurance in Canada 1868–1976" (LL.M. Thesis, York University, 1977), chap. 2, p. 39 which refers to the *Monetary Times*, February 3, 1871, p. 485.
7. The Report of the Superintendent of Insurance for Canada for the year 1876 shows that of the 40 companies in active business in Canada in 1867, only six were Canadian. In 1879 of the 20 companies in the fire business, only five were Canadian with 20 percent of the total business and of the 24 companies engaged in life insurance, only one was Canadian with only 12 percent of the business.
8. *The Insurance Act*, S.C. 1868, c. 48.
9. *The Life Assurance Companies Act*, 1870 (U.K.), 33 & 34 Vict. c. 61.
10. The report of the commission was very short and it is reproduced in an address by R.L. Foster, Superintendent of Insurance for Ontario, *Annual Report of the Superintendent of Insurance for Ontario* (1926), Appendix A.
11. S.O. 1876, c. 24.
12. (1881), 7 App. Cas. 96(P.C.).
13. V.C. MacDonald, "The Regulation of Insurance in Canada" (1946), 24 *Can. B. Rev.* 257.
14. The Supreme Court of Canada has more recently recognized federal legislative competence to regulate the consequences of an insurer's insolvency without doubting the continuing authority of the Privy Council decisions which struck down various schemes designed to prevent insolvency. See *A.G. for Ontario v. Policyholders of Wentworth Insurance Co.* (1969), 6 D.L.R. (3d) 545 (S.C.C.).
15. I have relied on the account of this history given by C. Armstrong, "Federalism and Government Regulations: The Case of the Canadian Insurance Industry 1927–34" (1976), 19 *Canadian Public Administration* 88.
16. The Select Committee on Company Law of the Ontario Legislative Assembly studied the insurance industry from 1976 to 1981 and issued five reports, namely: *The Insurance Industry, First Report on Automobile Insurance (1977); The Insurance Industry, Second Report on Automobile Insurance (1978); The Insurance Industry, Third Report on General Insurance (1979); The Insurance Industry, Fourth Report on Life Insurance (1980); The Insurance Industry, Fifth Report on Accident and Sickness Insurance (1981).* (Hereafter the Select Committee Reports on Automobile, General Insurance, Life, and Accident and Sickness Insurance respectively).
17. *Select Committee Report on Life Insurance*, p. 50.
18. In particular see Evan Gray, "More on the Regulation of Insurance"(1946), 24 *Can. B. Rev.* 481. Brown and Menezes, *supra*, note 2, p. 24 also seem to agree.
19. *Supra*, note 12. T*he Consolidated Insurance Act*, 1877, S.C. 1877, c. 42, s. 28, excluded from its application any provincial company "unless such company so desires to avail itself of the provisions of this Act". *The Ontario Insurance Act*, S.O. 1875, c. 23, s. 1 restricted its application to those insurers not registered under federal legislation.

20. *Supra*, note 15.
21. *Supra*, note 2, p. 25.
22. *Supra*, note 8.
23. *Supra*, note 11.
24. For a brief account of the early history of the development of uniform insurance laws see Foster, *supra*, note 10.
25. *Supra*, note 9.
26. E.g., Alberta.
27. See McCable, "The History of Life Insurance in Canada," in *Canada, an Encyclopedia of the Country*, vol. 5; Watson, "The Development of Life Insurance in Canada," in *Canada Year Book 1953*, p. 937.
28. See the recent *Reports* of the Superintendent of Insurance for Canada.
29. There is a growing concern amongst the Superintendents that this is now happening internationally, with off-shore re-insurers operating from countries with minimum government supervision.
30. S.C. 1868, c. 48; S.C. 1875, c. 20 and 21; S.C. 1877, c. 42.
31. See G. Tumwine-Mukubwa, *supra*, note 6, chap. 2, p. 44.
32. For the story of one company's reaction see Williamson and Smalley, *Northwestern Mutual Life: A Century of Trusteeship* (1957), p. 74. A similar reaction from the industry followed the adoption of the Robertson Law in Texas in 1907. See Kimball, "The Purpose of Insurance Regulation" (1961), 45 *Minn. Law Rev.* 471, 506.
33. G. Tumwine-Mukubwa, *supra*, note 6, chap. 2, p. 45 quoting statistics found in the *Annual Reports* of the Superintendent of Insurance for Canada.
34. *Ibid*, chap. 11, p. 33, quoting from *Debates*, House of Commons 1867–68, pp. 413, 756. See also Laverty, *The Insurance Law of Canada* (1936), p. 672 who attributes the continual assertion of federal jurisdiction to a desire for revenue which was derivable from the incorporation and licensing of insurance companies.
35. Although the Insurance Bureau of Canada calculated that the Property and Casualty Insurers paid a total of $219 million in provincial premium taxes in 1982. See *Facts of the General Insurance Industry in Canada* (11th ed., 1983).
36. Report of Commissioners dated Jan. 14, 1876. *Ontario Sessional Paper No. 50, 1875–76*, reproduced in Foster, *supra*, note 10.
37. S.O. 1976, c. 24.
38. See Riegel, Miller and Williams, *Insurance Principles and Practices* (6th ed., 1976), p. 144.
39. *The Citizens Ins. Co. of Canada v. Parsons* (1881), 7 App. Cas. 96.
40. *The Insurance Act*, S.C. 1886, c. 45.
41. *The Insurance Act*, S.C. 1917, c. 29.
42. [1942] S.C.R. 429, [1942] 4 P.L.R. 145, 9 I.L.R. 425.
43. In particular those of Ontario, Nova Scotia and Newfoundland.
44. In Ontario where an agent is unable to negotiate life insurance on behalf of the applicant with the insurer that he represents, the agent may obtain written consent from his insurer to place the insurance with another insurer. The written consent must be filed with the Ontario Superintendent of Insurance.
45. See *Select Committee Report on Life Insurance*, *supra*, note 16, pp. 328–29.
46. *Ibid*, p. 341.
47. *Ibid*, p. 354.
48. *Ibid*, p. 352.
49. *Ibid*, p. 346.
50. Ontario and Quebec.
51. *Insurance Act*, R.S.O. 1980, c. 218, Part XVIII.
52. For a typical discussion by the industry and Superintendents on the advantage of industry-wide rules over legislation, see *1973 Minutes of Proceedings of the Association of Superintendents of Insurance*, p. 119 and 122.

53. R.S.N.S. 1967, c. 148.
54. E.g., Newfoundland and Saskatchewan.
55. However, only a sample of mutual benefit societies are examined.
56. *Select Committee Report on Life Insurance*, p. 58.
57. See the *Annual Reports* of the Superintendent of Insurance for Ontario.
58. See the brief description of the "Origin of the Association" in the annual *Minutes of the Proceedings of the Association of Superintendents of Insurance*.
59. See Foster, *supra*, note 10.
60. See the *Minutes of the Proceedings of the Association of Superintendents of Insurance*.
61. For example, in Ontario several guidelines have been adopted by regulation.
62. The figures in the text are taken from the *Select Committee Report on General Insurance*, p. 27 and the *Select Committee Report on Life Insurance*, pp. 29–32. Additional and more recent figures can be found in the annual reports of the Superintendent of Insurance for Canada.
63. See the text *infra* under the heading "Insurance Industry Organizations."
64. For example, when the 1983 meetings coincided with the annual holidays of the *Globe and Mail*'s regular insurance reporter, the paper did not send anyone else, and the meetings were not reported in that paper at all.
65. For a description of the work of these royal commissions see V. Evan Gray, "An Evolutionary Pattern in Insurance Legislation" (1950), 28 *Can. B. Rev.* 493, at 501.
66. *Supra*, note 36.
67. *Report on Insurance Commission*, Ontario King's Printer, 1919.
68. *Interim Report*, Ontario King's Printer, 1930.
69. The Armstrong Committee was appointed on July 20, 1903 to investigate the life insurance business. The committee's report was presented in Feb., 1906. See State of N.Y.: *Assembly Document No. 41* (Feb. 22, 1906, Albany).
70. See the Royal Commission's Report, *Canada Sessional Paper No. 123a*, 1907.
71. *Supra*, note 65 and Foster, *supra*, note 10.
72. Foster, *supra*, note 10.
73. *Supra*, note 16.
74. See *Minutes of Proceedings of the Association of Superintendents of Insurance* for recent years.
75. Kimball, *Insurance and Public Policy* (Milwaukee: University of Wisconsin Press, 1960).
76. *Supra*, note 67.
77. In Ontario see *Insurance Act*, R.S.O. 1980, c. 218, Part XV, Rates and Rating Bureaus.
78. This account is based on the description in the *Principles and Practice of Insurance*, Correspondence Course No. 1, published by The Insurance Institute of Canada (1975), Study 10.
79. See the *Select Committee Report on Life Insurance*, p. 226 and the CLHIA *Response to The Ontario Select Committee Report on Life Insurance* (1983), p. 65.
80. E.g., *Insurance Act*, R.S.O. 1980, c. 218, s. 80.
81. *Supra*, note 67.
82. *Select Committee Report on General Insurance*, p. 414.
83. The Canadian insurance policies in general use, including those issued by such promulgating bodies as The Insurance Bureau of Canada and the Insurers Advisory Organization of Canada are published in the *Insurance Forms Manual* by the Insurance Forms Company, Ltd., Toronto.
84. *Select Committee Report on Life Insurance*, chap. 4.
85. *Facts of the General Insurance Industry in Canada* (11th ed., 1983), p. 39.
86. *Ibid.*
87. The IBC agreements include the *Agreement Respecting Standardization of Claims*

Forms and Practices and Guidelines for Settlements of Claims, Property/Boiler Disputed Loss Agreement, and *Guiding Principles with Respect to Overlapping Coverages Relating to Property Insurance*. The first two agreements are reproduced in Brown and Menezes, *Insurance Law in Canada* (1982), Appendix F and G, pp. 455 and 503. In addition the Canadian Insurance Claims Managers' Association supervises the operation of the Canadian Inter-Company Arbitration Agreement under which most automobile and general liability insurers agree to settle claims disputes through binding arbitration.

88. See CLHIA Response to the Ontario *Select Committee Report on Life Insurance* (1983), p. iii.
89. The list in the text is from the *Select Committee Report on Life Insurance*, p. 42.
90. The list in the text is taken from *Facts*, *supra*, note 85, pp. 47–52.
91. The *Registered Insurance Brokers Act*, R.S.O. 1980, c. 444.
92. *Supra*, note 74.
93. This was the name suggested by CLIA in 1980 before its merger with the CAASI.
94. *Select Committee Report on Accident and Sickness Insurance*, p. 349.
95. See *Insurance Act*, R.S.O. 1950, c. 183, s. 134. There were equivalent sections in the insurance acts of the other provinces.
96. [1958] S.C.R. 3, 11 D.L.R. (2d) 225, [1957] I.L.R. 1–279.
97. *Minutes of Proceedings of the Association of Superintendents of Insurance* (1958), p. 51.
98. See *Insurance Act*, R.S.O. 1980, c. 218, s. 149. There are equivalent sections in the insurance acts of the other provinces.
99. *Supra*, note 98, s. 150.
100. *Supra*, note 98, ss. 244, 245.
101. *Supra*, note 98, s. 182.
102. E.g., R.S.O. 1980, c. 218, s. 100.
103. The leading case is *The Imperial Life Insurance Co. of Canada v. Colmenares*, [1967] S.C.R. 443.
104. *Supra*, note 98, s. 212.
105. *Supra*, note 98, s. 220.
106. *Supra*, note 98, s. 226.
107. See the "Selected Bibliography" in Castel, *Conflict of Laws, Cases, Notes and Materials* (4th ed., 1978), p. 13-1.
108. *Proctor v. MacDonald*, [1979] 2 S.C.R. 153, [1980] I.L.R. 1–1164 105 D.L.R. (3d) 169 and *Gervais v. Ash*, [1978] I.L.R. 1–984, 5 Alta. L.R. (2d) 306, 85 D.L.R. (3d) 439 (S.C.).
109. *Minutes of the Proceedings of the Association of Superintendents of Insurance* (1981), pp. 72–74. For an example of the undertakings required by some American states see *Travelers Canada v. MacDonald et al.* (1984), 4 C.C.L.I. 313 (Ont. H.C.).
110. Contrast the cases *supra*, note 108 which required remedial legislation with *Gillis v. Bates*, [1979] I.L.R. 1–984, 5 Alta. L.R. (2d) 306, 85 D.L.R. (3d) 439 (S.C.).
111. The memorandum of agreement is reproduced in Brown and Menezes, *Insurance Law in Canada* (1982), Appendix C, pp. 444–49.
112. *Automobile Insurance Act*, L.Q. 1977, c. 68, s. 8; *Insurance Act*, R.S.O. 1980, c. 224 and Ont. Reg. 1004/78.
113. See Spencer L. Kimball, *The American Experience in State Regulation of a National Insurance Business in Insurance Law in Europe and The United States* (British Institute of International and Comparative Law, Special Publication No. 4, 1964).
114. The United States Supreme Court in *U.S. v. Southeastern Underwriters Assn.*, 322 U.S. 533 (1944) held that insurance was commerce and subject to the federal Sherman Act. This reversed a long standing decision of the Supreme Court, *Paul v. Virginia* 8 Wall. 168 (1869), which upheld a state law regulating insurance agents on the ground that insurance was not an article of commerce.

115. Public Law 15 of the 79th Congress, March 9, 1945, 59 Stat. 33, 15 U.S.C.A. ss. 1011 et seq.

116. *Supra*, note 113, p. 53.

117. *Supra*, note 114.

118. *Supra*, note 113, p. 53.

119. Keynes dealt with the problem in his *General Theory* (1936), chap. 23. A later influential contribution was by Professor Titmuss, *The Irresponsible Society, Essays on the Welfare State* (2nd ed., 1963), p. 215ff. See also Orren, *Corporate Power and Social Change* (1974).

120. There has been more independent local action by Superintendents, especially the Ontario Superintendent, in the issuing of guidelines and directives. Usually, these local initiatives are subsequently adopted by the Association of Superintendents.

121. Although the situation is not as bleak for insureds as it is in England, see Reuben Hasson, "The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance" (1984), 47 *Mod. L. Rev.* 505. The responsibility for the weak legal position of the insured does not rest solely with the Association of Superintendents. Provincial legislatures are primarily responsible for the insured's position, but their lack of knowledge about the details of insurance law and their deference to the technical knowledge of the Superintendents have prevented them from adopting greater protection for the insured. At the same time, Canadian courts have not come to the aid of the insured. All too often they have followed English precedents without considering their appropriateness in a Canadian context or else have interpreted ameliorating statutes in a restrictive manner.

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University of Toronto Press

Royal Commission on the Economic Union and Development Prospects for Canada

ISBN 0-8020-7303-4